An Introduction to

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Chapter 1

Introduction

UNDERSTANDING THE HUMAN RIGHTS

Human rights are certain moral guarantees. This substance examines the philosophical basis and content of the doctrine of human rights. The analysis consists of five parts and a conclusion.

Part one assesses the contemporary significance of human rights, and argues that the doctrine of human rights has become the dominant moral doctrine for evaluating the moral status of the contemporary geo-political order. Part two proceeds to chart the historical development of the concept of human rights, beginning with a discussion of the earliest philosophical origins of the philosophical bases of human rights and culminating in some of most recent developments in the codification of human rights. Part three considers the philosophical concept of a human right and analyses the formal and substantive distinctions philosophers have drawn between various forms and categories of rights.

Part four addresses the question of how philosophers have sought to justify the claims of human rights and specifically charts the arguments presented by the two presently dominant approaches in this field: interest theory and will theory. Part five then proceeds to discuss some of the main criticisms currently levelled at the doctrine of human rights and highlights some of the main arguments of those who have challenged the universalist and objectivist bases of human rights. Finally, a brief conclusion is presented, summarising the main themes addressed.

THE CONTEMPORARY SIGNIFICANCE OF HUMAN RIGHTS

Human rights have been defined as:

> Basic moral guarantees that people in all countries and cultures allegedly have simply because they are people. Calling these guarantees "rights" suggests that they attach to particular individuals who can invoke them, that they are of high priority, and that compliance with them is mandatory rather than discretionary. Human rights are frequently held to be universal in the sense that all people have and should enjoy them, and to be independent in the sense that they exist and are available as standards of justification and criticism whether or not they are recognized and implemented by the legal system or officials of a country.

The moral doctrine of human rights aims at identifying the fundamental prerequisites for each human being leading a minimally good life. Human rights aim to identify both the necessary negative and positive prerequisites for leading a minimally good life, such as rights against torture and rights to health care. This aspiration has been enshrined in various declarations and legal conventions issued during the past fifty years, initiated by the Universal Declaration of Human Rights and perpetuated by, most importantly, the European Convention on Human Rights and the International Covenant on Civil and Economic Rights.

Together these three documents form the centrepiece of a moral doctrine that many consider to be capable of providing the contemporary geo-political order with what amounts to an international bill of rights. However, the doctrine of human rights does not aim to be a fully comprehensive moral doctrine.

An appeal to human rights does not provide us with a fully comprehensive account of morality *per se*. Human rights do not, for example, provide us with criteria for answering such questions as whether telling lies is inherently immoral, or what the extent of one's moral obligations to friends and lovers ought to be? What human rights do primarily aim to identify is the basis for determining the shape, content, and

scope of fundamental, public moral norms. As James Nickel states, human rights aim to secure for individuals the necessary conditions for leading a minimally good life.

Public authorities, both national and international, are identified as typically best placed to secure these conditions and so, the doctrine of human rights has become, for many, a first port of moral call for determining the basic moral guarantees all of us have a right to expect, both of one another but also, primarily, of those national and international institutions capable of directly affecting our most important interests.

The doctrine of human rights aspires to provide the contemporary, allegedly post-ideological, geo-political order with a common framework for determining the basic economic, political, and social conditions required for all individuals to lead a minimally good life.

While the practical efficacy of promoting and protecting human rights is significantly aided by individual nation-states' legally recognising the doctrine, the ultimate validity of human rights is characteristically thought of as not conditional upon such recognition. The moral justification of human rights is thought to precede considerations of strict national sovereignty. An underlying aspiration of the doctrine of human rights is to provide a set of legitimate criteria to which all nation-states should adhere.

Appeals to national sovereignty should not provide a legitimate means for nation-states to permanently opt out of their fundamental human rights-based commitments. Thus, the doctrine of human rights is ideally placed to provide individuals with a powerful means for morally auditing the legitimacy of those contemporary national and international forms of political and economic authority which confront us and which claim jurisdiction over us.

This is no small measure of the contemporary moral and political significance of the doctrine of human rights. For many of its most strident supporters, the doctrine of human rights aims to provide a fundamentally legitimate moral basis for regulating the contemporary geo-political order.

HISTORICAL ORIGINS AND DEVELOPMENT OF THE THEORY AND PRACTICE OF HUMAN RIGHTS

The doctrine of human rights rests upon a particularly fundamental philosophical claim: that there exists a rationally identifiable moral order, an order whose legitimacy precedes contingent social and historical conditions and applies to all human beings everywhere and at all times. On this view, moral beliefs and concepts are capable of being objectively validated as fundamentally and universally true. The contemporary doctrine of human rights is one of a number of universalist moral perspectives. The origins and development of the theory of human rights is inextricably tied to the development of moral universalism.

The history of the philosophical development of human rights is punctuated by a number of specific moral doctrines which, though not themselves full and adequate expressions of human rights, have nevertheless provided a number of philosophical prerequisites for the contemporary doctrine. These include a view of morality and justice as emanating from some pre-social domain, the identification of which provides the basis for distinguishing between 'true' and merely 'conventional' moral principles and beliefs. The essential prerequisites for a defence of human rights also include a conception of the individual as the bearer of certain 'natural' rights and a particular view of the inherent and equal moral worth of each rational individual. I shall discuss each in turn.

Human rights rest upon moral universalism and the belief in the existence of a truly universal moral community comprising all human beings. Moral universalism posits the existence of rationally identifiable trans-cultural and trans-historical moral truths. The origins of moral universalism within Europe are typically associated with the writings of Aristotle and the Stoics. Thus, in his *Nicomachean Ethics*, Aristotle unambiguously expounds an argument in support of the existence of a natural moral order. This natural order ought to provide the basis for all truly rational systems of justice. An appeal to the natural order provides a set of comprehensive

and potentially universal criteria for evaluating the legitimacy of actual 'man-made' legal systems. In distinguishing between 'natural justice' and 'legal justice', Aristotle writes, 'the natural is that which has the same validity everywhere and does not depend upon acceptance.'

Thus, the criteria for determining a truly rational system of justice pre-exist social and historical conventions. 'Natural justice' pre-exists specific social and political configurations. The means for determining the form and content of natural justice is the exercise of reason free from the distorting effects of mere prejudice or desire. This basic idea was similarly expressed by the Roman Stoics, such as Cicero and Seneca, who argued that morality originated in the rational will of God and the existence of a cosmic city from which one could discern a natural, moral law whose authority transcended all local legal codes.

The Stoics' argued that this ethically universal code imposed upon all of us a duty to obey the will of god. The Stoics thereby posited the existence of a universal moral community effected through our shared relationship with god. The belief in the existence of a universal moral community was maintained in Europe by Christianity over the ensuing centuries. While some have discerned intimations towards the notion of rights in the writings of Aristotle, the Stoics, and Christian theologians, a concept of rights approximating that of the contemporary idea of human rights most clearly emerges during the 17th. and 18th. centuries in Europe and the so-called doctrine of natural law.

The basis of the doctrine of natural law is the belief in the existence of a natural moral code based upon the identification of certain fundamental and objectively verifiable human goods. Our enjoyment of these basic goods is to be secured by our possession of equally fundamental and objectively verifiable natural rights. Natural law was deemed to pre-exist actual social and political systems. Natural rights were thereby similarly presented as rights individuals possessed independently of society or polity. Natural rights were thereby presented as ultimately valid irrespective of whether they had achieved the

recognition of any given political ruler or assembly. The quintessential exponent of this position was the 17th century philosopher John Locke and, in particular, the argument he outlined in his *Two Treatises of Government*. At the centre of Locke's argument is the claim that individuals possess natural rights, independently of the political recognition granted them by the state.

These natural rights are possessed independently of, and prior to, the formation of any political community. Locke argued that natural rights flowed from natural law. Natural law originated from God. Accurately discerning the will of God provided us with an ultimately authoritative moral code. At root, each of us owes a duty of self-preservation to God. In order to successfully discharge this duty of self-preservation each individual had to be free from threats to life and liberty, whilst also requiring what Locke presented as the basic, positive means for self-preservation: personal property. Our duty of self-preservation to god entailed the necessary existence of basic natural rights to life, liberty, and property.

Locke proceeded to argue that the principal purpose of the investiture of political authority in a sovereign state was the provision and protection of individuals' basic natural rights. For Locke, the protection and promotion of individuals' natural rights was the sole justification for the creation of government. The natural rights to life, liberty, and property set clear limits to the authority and jurisdiction of the State.

States were presented as existing to serve the interests, the natural rights, of the people, and not of a Monarch or a ruling cadre. Locke went so far as to argue that individuals are morally justified in taking up arms against their government should it systematically and deliberately fail in its duty to secure individuals' possession of natural rights. Analyses of the historical predecessors of the contemporary theory of human rights typically accord a high degree of importance to Locke's contribution.

Certainly, Locke provided the precedent of establishing legitimate political authority upon a rights foundation. This is an undeniably essential component of human rights. However,

the philosophically adequate completion of theoretical basis of human rights requires an account of moral reasoning, that is both consistent with the concept of rights, but which does not necessarily require an appeal to the authority of some super-human entity in justifying human beings' claims to certain, fundamental rights. The 18th century German philosopher, Immanuel Kant provides such an account.

Many of the central themes first expressed within Kant's moral philosophy remain highly prominent in contemporary philosophical justifications of human rights. Foremost amongst these are the ideals of equality and the moral autonomy of rational human beings. Kant bestows upon contemporary human rights' theory the ideal of a potentially universal community of rational individuals autonomously determining the moral principles for securing the conditions for equality and autonomy. Kant provides a means for justifying human rights as the basis for self-determination grounded within the authority of human reason.

Kant's moral philosophy is based upon an appeal to the formal principles of ethics, rather than, for example, an appeal to a concept of substantive human goods. For Kant, the determination of any such goods can only proceed from a correct determination of the formal properties of human reason and thus do not provide the ultimate means for determining the correct ends, or object, of human reason. Kant's moral philosophy begins with an attempt to correctly identify those principles of reasoning that can be applied equally to all rational persons, irrespective of their own specific desires or partial interests. In this way, Kant attaches a condition of universality to the correct identification of moral principles.

For him, the basis of moral reasoning must rest upon a condition that all rational individuals are bound to assent to. Doing the right thing is thus not determined by acting in pursuit of one's own interests or desires, but acting in accordance with a maxim which all rational individuals are bound to accept. Kant terms this the categorical imperative, which he formulates in the following terms, 'act only on that maxim through which you can at the same time will that it

should become a universal law.' Kant argues that this basic condition of universality in determining the moral principles for governing human relations is a necessary expression of the moral autonomy and fundamental equality of all rational individuals.

The categorical imperative is self-imposed by morally autonomous and formally equal rational persons. It provides the basis for determining the scope and form of those laws which morally autonomous and equally rational individuals will institute in order to secure these very same conditions. For Kant, the capacity for the exercise of reason is the distinguishing characteristic of humanity and the basis for justifying human dignity. As the distinguishing characteristic of humanity, formulating the principles of the exercise of reason must necessarily satisfy a test of universality; they must be capable of being universally recognized by all equally rational agents. Hence, Kant's formulation of the categorical imperative. Kant's moral philosophy is notoriously abstract and resists easy comprehension.

Though often overlooked in accounts of the historical development of human rights, his contribution to human rights has been profound. Kant provides a formulation of fundamental moral principles that, though exceedingly formal and abstract, are based upon the twin ideals of equality and moral autonomy. Human rights are rights we give to ourselves, so to speak, as autonomous and formally equal beings. For Kant, any such rights originate in the formal properties of human reason, and not the will of some super-human being.

The philosophical ideas defended by the likes of Locke and Kant have come to be associated with the general Enlightenment project initiated during the 17th and 18th centuries, the effects of which were to extend across the globe and over ensuing centuries. Ideals such as natural rights, moral autonomy, human dignity and equality provided a normative bedrock for attempts at re-constituting political systems, for overthrowing formerly despotic regimes and seeking to replace them with forms of political authority capable of protecting and promoting these new emancipatory ideals. These ideals

effected significant, even revolutionary, political upheavals throughout the 18th century, enshrined in such documents as the United States' Declaration of Independence and the French National Assembly's Declaration of the Rights of Man and Citizen.

Similarly, the concept of individual rights continued to resound throughout the 19th century exemplified by Mary Wollstencraft's *Vindication of the Rights of Women* and other political movements to extend political suffrage to parts of society who had been denied the possession of political and civil rights. The concept of rights had become a vehicle for effecting political change. Though one could argue that the conceptual prerequisites for the defence of human rights had long been in place, a full Declaration of the doctrine of human rights only finally occurred during the 20th century and only in response to the most atrocious violations of human rights, exemplified by the Holocaust.

The Universal Declaration of Human Rights was adopted by the UN General Assembly on 10th December 1948 and was explicitly motivated to prevent the future occurrence of any similar atrocities. The Declaration itself goes far beyond any mere attempt to reassert all individuals' possession of the right to life as a fundamental and inalienable human right. The UDHR consists of a Preamble and 30 substances which separately identify such things as the right not to be tortured, a right to asylum, a right to own property and a right to an adequate standard of living as being fundamental human rights.

As I noted earlier, the UDHR has been further supplemented by such documents as the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Economic, Social and Cultural Rights. The specific aspirations contained within these three documents have themselves been reinforced by innumerable other Declarations and Conventions. Taken together these various Declarations, conventions and covenants comprise the contemporary human rights doctrine and embody both the belief in the existence of a universally valid moral order and a belief in all human beings' possession of

fundamental and equal moral status, enshrined within the concept of human rights. It is important to note, however, that the contemporary doctrine of human rights, whilst deeply indebted to the concept of natural rights, is not a mere expression of that concept but actually goes beyond it in some highly significant respects.

James Nickel identifies three specific ways in which the contemporary concept of human rights differs from, and goes beyond that of natural rights. *First,* he argues that contemporary human rights are far more concerned to view the realization of equality as requiring positive action by the state, via the provision of welfare assistance, for example. Advocates of natural rights, he argues, were far more inclined to view equality in formalistic terms, as principally requiring the state to refrain from 'interfering' in individuals' lives. *Second,* he argues that, whereas advocates of natural rights tended to conceive of human beings as mere individuals, veritable 'islands unto themselves', advocates of contemporary human rights are far more willing to recognize the importance of family and community in individuals' lives.

Third, Nickel views contemporary human rights as being far more 'internationalist' in scope and orientation than was typically found within arguments in support of natural rights. That is to say, the protection and promotion of human rights are increasingly seen as requiring international action and concern. The distinction drawn by Nickel between contemporary human rights and natural rights allows one to discern the development of the concept of human rights. Indeed, many writers on human rights agree in the identification of three generations of human rights. First generation rights consist primarily of rights to security, property, and political participation.

These are most typically associated with the French and US Declarations. Second generation rights are construed as socio-economic rights, rights to welfare, education, and leisure, for example. These rights largely originate within the UDHR. The final and third generation of rights are associated with such rights as a right to national self-determination, a clean

environment, and the rights of indigenous minorities. This generation of rights really only takes hold during the last two decades of the 20th century but represents a significant development within the doctrine of human rights generally.

While the full significance of human rights may only be finally dawning on some people, the concept itself has a history spanning over two thousand years. The development of the concept of human rights is punctuated by the emergence and assimilation of various philosophical and moral ideals and appears to culminate, at least to our eyes, in the establishment of a highly complex set of legal and political documents and institutions, whose express purpose is the protection and promotion of the fundamental rights of all human beings everywhere. Few should underestimate the importance of this particular current of human history.

PHILOSOPHICAL ANALYSIS OF THE CONCEPT OF HUMAN RIGHTS

Human rights are rights that attach to human beings and function as moral guarantees in support of our claims towards the enjoyment of a minimally good life. In conceptual terms, human rights are themselves derivative of the concept of a right. This part focuses upon the philosophical analysis of the concept of a 'right' in order to clearly demonstrate the various constituent parts of the concept from which human rights emerges. In order to gain a full understanding of both the philosophical foundations of the doctrine of human rights and the different ways in which separate human rights function.

Moral vs. Legal Rights

The distinction drawn between moral rights and legal rights as two separate categories of rights is of fundamental importance to understanding the basis and potential application of human rights. Legal rights refer to all those rights found within existing legal codes. A legal right is a right that enjoys the recognition and protection of the law. Questions as to its existence can be resolved by simply locating the relevant legal instrument or piece of legislation.

A legal right cannot be said to exist prior to its passing into law and the limits of its validity are set by the jurisdiction of the body which passed the relevant legislation. An example of a legal right would be my daughter's legal right to receive an adequate education, as enshrined within the United Kingdom's Education Act. Suffice it to say, that the exercise of this right is limited to the United Kingdom.

My daughter has no legal right to receive an adequate education from a school board in Southern California. Legal positivists argue that the only rights that can be said to legitimately exist are legal rights, rights that originate within a legal system. On this view, moral rights are not rights in the strict sense, but are better thought of as moral claims, which may or may not eventually be assimilated within national or international law.

For a legal positivist, such as the 19th century legal philosopher Jeremy Bentham, there can be no such thing as human rights existing prior to, or independently from legal codification. For a positivist determining the existence of rights is no more complicated than locating the relevant legal statute or precedent. In stark contrast, moral rights are rights that, it is claimed, exist prior to and independently from their legal counterparts.

The existence and validity of a moral right is not deemed to be dependent upon the actions of jurists and legislators. Many people argued, for example, that the black majority in apartheid South Africa possessed a moral right to full political participation in that country's political system, even though there existed no such legal right. What is interesting is that many people framed their opposition to apartheid in rights terms. What many found so morally repugnant about apartheid South Africa was precisely its denial of numerous fundamental moral rights, including the rights not to be discriminated against on grounds of colour and rights to political participation, to the majority of that country's inhabitants. This particular line of opposition and protest could only be pursued because of a belief in the existence and validity of moral rights. A belief that fundamental rights which may or may not have

received legal recognition elsewhere, remained utterly valid and morally compelling even, and perhaps especially, in those countries whose legal systems had not recognized these rights. A rights-based opposition to apartheid South Africa could not have been initiated and maintained by appeal to legal rights, for obvious reasons. No one could legitimately argue that the legal political rights of non-white South Africans were being violated under apartheid, since no such legal rights existed. The systematic denial of such rights did, however, constitute a gross violation of those peoples' fundamental moral rights.

From the example it should be clear that human rights cannot be reduced to, or exclusively identified with legal rights. The legal positivist's account of justified law excludes the possibility of condemning such systems as apartheid from a rights perspective. It might, therefore, appear tempting to draw the conclusion that human rights are best identified as moral rights. After all, the existence of the UDHR and various International Covenants, to which South Africa was not a signatory in most cases, provided opponents of apartheid with a powerful moral argument.

Apartheid was founded upon the denial of fundamental human rights. Human rights certainly share an essential quality of moral rights, namely, that their valid existence is not deemed to be conditional upon their being legally recognized. Human rights are meant to apply to all human beings everywhere, regardless of whether they have received legal recognition by all countries everywhere. Clearly, there remain numerous countries that wholly or partially exclude formal legal recognition to fundamental human rights. Supporters of human rights in these countries insist that the rights remain valid regardless, as fundamental moral rights. The universality of human rights positively entails such claims. The universality of human rights as moral rights clearly lends greater moral force to human rights. However, for their part, legal rights are not subject to disputes as to their existence and validity in quite the way moral rights are.

It would be a mistake to exclusively identify human rights with moral rights. Human rights are better thought of as both

moral rights and legal rights. Human rights originate as moral rights and their legitimacy is necessarily dependent upon the legitimacy of the concept of moral rights. A principal aim of advocates of human rights is for these rights to receive universal legal recognition. This was, after all, a fundamental goal of the opponents of apartheid. Human rights are best thought of, therefore, as being both moral and legal rights.

The legitimacy claims of human rights are tied to their status as moral rights. The practical efficacy of human rights is, however, largely dependent upon their developing into legal rights. In those cases where specific human rights do not enjoy legal recognition moral rights must be prioritised with the intention that defending the moral claims of such rights as a necessary prerequisite for the eventual legal recognition of the rights in question.

Claim Rights and Liberty Rights

To gain an understanding of the functional properties of human rights it is necessary to consider the more specific distinction drawn between claim rights and liberty rights. It should be noted that it is something of a convention to begin such discussions by reference to W.N. Hohfeld's more extended classification of rights. Hohfeld identified four categories of rights: liberty rights, claim rights, power rights, and immunity rights. However, numerous scholars have subsequently tended to collapse the last two within the first two and hence to restrict attention to liberty rights and claim rights. The political philosopher Peter Jones provides one such example. Jones restricts his focus to the distinction between claim rights and liberty rights. He conforms to a well-established trend in rights' analysis in viewing the former as being of primary importance. Jones defines a claim right as consisting of being owed a duty.

A claim right is a right one holds against another person or persons who owe a corresponding duty to the right holder. To return to the example of my daughter. Her right to receive an adequate education is a claim right held against the local education authority, which has a corresponding duty to provide her with the object of the right. Jones identifies further

necessary distinctions within the concept of a claim right when he distinguishes between a positive claim right and a negative claim right.

The former are rights one holds to some specific good or service, which some other has a duty to provide. My daughter's claim right to education is therefore a positive claim right. Negative claim rights, in contrast, are rights one holds against others' interfering in or trespassing upon one's life or property in some way.

My daughter could be said to possess a negative claim right against others attempting to steal her mobile phone, for example. Indeed, such examples lead on to the final distinction Jones identifies within the concept of claim rights: rights held 'in personam' and rights held 'in rem'. Rights held in personam are rights one holds against some specifically identified duty holder, such as the education authority. In contrast, rights held in rem are rights held against no one in particular, but apply to everyone.

Thus, my daughter's right to an education would be practically useless were it not held against some identifiable, relevant, and competent body. Equally, her right against her mobile phone being stolen from her would be highly limited if it did not apply to all those capable of potentially performing such an act. Claim rights, then, can be of either a positive or a negative character and they can be held either in personam or in rem.

Jones defines liberty rights as rights which exist in the absence of any duties not to perform some desired activity and thus consist of those actions one is not prohibited from performing. In contrast to claim rights, liberty rights are primarily negative in character. For example, I may be said to possess a liberty right to spend my vacations lying on a particularly beautiful beach in Greece.

Unfortunately, no one has a duty to positively provide for this particular exercise of my liberty right. There is no authority or body, equivalent to an education authority, for example, who has a responsibility to realise my dream for me. A liberty right can be said, then, to be a right to do as one pleases

precisely because one is not under an obligation, grounded in others' claim rights, to refrain from so acting. Liberty rights provide for the capacity to be free, without actually providing the specific means by which one may pursue the objects of one's will. For example, a multi-millionaire and a penniless vagrant both possess an equal liberty right to holiday in the Caribbean each year.

Substantive Categories of Human Rights

The concerned to analyse what might be termed the 'formal properties' of rights. This part, in contrast, proceeds to consider the different categories of substantive human rights. If one delves into all of the various documents that together form the codified body of human rights, one can identify and distinguish between five different categories of substantive human rights. These are as follows: rights to life; rights to freedom; rights to political participation; rights to the protection of the rule of law; rights to fundamental social, economic, and cultural goods. These rights span the so-called three generations of rights and involve a complex combination of both liberty and claim rights.

Some rights, such as for example the right to life, consist of both liberty and claim rights in roughly equal measure. Thus, the adequate protection of the right to life requires the existence of liberty rights against others trespassing against one's person and the existence of claim rights to have access to basic prerequisites to sustaining one's life, such as an adequate diet and health-care. Other rights, such as social, economic, and cultural rights, for example, are weighted more heavily towards the existence of various claim rights, which requires the positive provision of the objects of such rights.

The making of substantive distinctions between human rights can have controversial, but important, consequences. Human rights are typically understood to be of equal value, each right is conceived of as equally important as every other. On this view, there can exist no potential for conflict between fundamental human rights. One is simply meant to attach equal moral weight to each and every human right. This prohibits

arranging human rights in order of importance. However, conflict between rights can and does occur. Treating all human rights as of equal importance prohibits any attempts to address or resolve such conflict when it arises. Take the example of a hypothetical developing world country with severely limited financial and material resources.

This country is incapable of providing the resources for realising all of the human rights for all of its citizens, though it is committed to doing so. In the meantime, government officials wish to know which human rights are more absolute than others, which fundamental human rights should it immediately prioritise and seek to provide for? This question, of course, cannot be answered if one sticks to the position that all rights are of equal importance. It can only be addressed if one allows for the possibility that some human rights are more fundamental than others and that the morally correct action for the government to take would be to prioritise these rights.

A refusal to do so, no matter how consistent it may be philosophically would be tantamount to dogmatically sticking one's head in the metaphorical sands. Attempting to make such distinctions is, of course, a philosophically fraught exercise. It clearly requires the existence of some more ultimate criteria against which one can 'measure' the relative importance of separate human rights. This is a highly controversial issue within the philosophy of human rights and one which I shall return to when I consider how philosophers attempt to justify the doctrine of human rights. What remains to be addressed in our analysis of the concept of a human right are the questions of what adequately implementing human rights generally requires, and upon whom does this task fall; who has responsibility for protecting and promoting human rights and what is required of them to do so?

Scope of Human Rights Duties

Human rights are said to be possessed equally, by everyone. A conventional corollary of this claim is that everyone has a duty to protect and promote the human rights

of everyone else. However, in practice, the onus for securing human rights typically falls upon national governments and international, intergovernmental bodies. Philosophers such as Thomas Pogge argue that the moral burden for securing human rights should fall disproportionately upon such institutions precisely because they are best placed and most able to effectively perform the task.

On this reading, non-governmental organizations and private citizens have an important role to play in supporting the global protection of human rights, but the onus must fall upon the relevant national and international institutions, such as the governments of nation-states and such bodies as the United Nations and the World Bank. One might wish to argue that, for example, human rights can be adequately secured by the existence of reciprocal duties held between individuals across the globe. However, 'privatizing' human rights in this fashion would ignore two particularly salient factors: individuals have a tendency to prioritise the moral demands of those closest to them, particularly members of their own family or immediate community; individuals' ability to exercise their duties is, to a large extent, determined by their own personal financial circumstances.

Thus, global inequalities in the distribution of wealth fundamentally undermine the ability of those in the poorer countries to reciprocate assistance provided them by those living in wealthier countries. Reasons such as these underlie Pogge's insistence that the onus of responsibility lies at the level of national and international institutions. Adequately protecting and promoting human rights requires both nation-states ensuring the adequate provision of services and institutions for their own citizens and the co-operation of nation-states within international institutions acting to secure the requisite global conditions for the protection and promotion of everyone's human rights.

What must such bodies actively do to adequately secure individuals' human rights? Does my daughter's human right to receive an adequate education require the education authority to do everything possible to assist and enhance my

child's education? Does it require the provision of a world-class library, frequent study trips abroad, and employing the most able and best-qualified teachers? The answer is, of course, no. Given the relative scarcity of resources and the demands placed upon those resources, we are inclined to say that adequately securing individuals' human rights extends to the establishment of decent social and governmental practice so as to ensure that all individuals have the opportunity of leading a minimally good life.

In the first instance, national governments are typically held to be primarily responsible for the adequate provision of their own citizens' human rights. Philosophers such as Brian Orend endorse this aspiration when he writes that the object of human rights is to secure 'minimal levels of decent and respectful treatment.' It is important to note, however, that the duty ensure the provision of even minimal levels of decent and respectful treatment cannot be strictly limited by national boundaries. The adequate protection and promotion of everyone's human rights does require, for example, the more affluent and powerful nation-states providing sufficient assistance to those countries currently incapable of adequately ensuring the protection of their own citizens' basic human rights. While some may consider Orend's aspirations for human rights to be unduly cautious, even the briefest survey of the extent of human suffering and deprivation in many parts of the world today is sufficient to demonstrate just how far we are from realizing even this fairly minimal standard.

National and international institutions bear the primary responsibility of securing human rights and the test for successfully fulfilling this responsibility is the creation of opportunities for all individuals to lead a minimally good life. The realization of human rights requires establishing the conditions for all human beings to lead minimally good lives and thus should not be confused as an attempt to create a morally perfect society. The impression that many have of human rights as being unduly utopian testifies less to the inherent demands of human rights and more to the extent to which even fairly modest aspirations are so far from being

realised in the world today. The actual aspirations of human rights are, on the face of it, quite modest. However, this should not distract from a full appreciation of the possible force of human rights. Human rights call for the creation of politically democratic societies in which all citizens have the means of leading a minimally good life. While the object of individual human rights may be modest, the force of that right is intended to be near absolute. That is to say, the demands of rights are meant to take precedence over other possible social goals. Ronald Dworkin has coined the term 'rights as trumps' to describe this property.

He writes that, 'rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.' In general, Dworkin argues, considerations of rights claims must take priority over alternative considerations when formulating public policy and distributing public benefits. Thus, for example, a minority's possession of rights against discriminatory treatment should trump any and all considerations of the possible benefits that the majority would derive from discriminating against the minority group. Similarly, an individual's right to an adequate diet should trump other individuals' desires to eat lavish meals, despite the aggregate gain in pleasure these individuals would derive.

For Dworkin, rights as trumps expresses the fundamental ideal of equality upon which the contemporary doctrine of human rights rests. Treating rights as trumps is a means for ensuring that all individuals are treated in an equal and like fashion in respect of the provision of fundamental human rights. Fully realizing the aspirations of human rights may not require the provision of 'state-of-the-art' resources, but this should not detract from the force of human rights as taking priority over alternative social and political considerations.

PHILOSOPHICAL JUSTIFICATIONS OF HUMAN RIGHTS

We have established that human rights originate as moral rights but that the successful passage of many human rights

into international and national law enables one to think of human rights as, in many cases, both moral rights and legal rights. Furthermore, human rights may be either claim rights or liberty rights, and have a negative or a positive complexion in respect of the obligations imposed by others in securing the right. Human rights may be divided into five different categories and the principal object of securing human rights is the creation of the conditions for all individuals to have the opportunity to lead a minimally good life.

Finally, human rights are widely considered to trump other social and political considerations in the allocation of public resources. Broadly speaking, philosophers generally agree on such issues as the formal properties of human rights, the object of human rights, and the force of human rights. However, there is much less agreement upon the fundamental question on how human rights may be philosophically justified. It would be fair to say that philosophers have provided many different, at times even conflicting, answers to this question. Philosophers have sought to justify human rights by appeal to single ideals such as equality, autonomy, human dignity, fundamental human interests, the capacity for rational agency, and even democracy. For the purposes of clarity and relative simplicity I will focus upon the two, presently most prominent, philosophical attempts to justify human rights: interests theory and will theory. Before I do that, it is necessary to address a prior question.

Do Human Rights Require Philosophical Justification?

Many people tend to take the validity of human rights for granted. Certainly, for many non-philosophers human rights may all too obviously appear to rest upon self-evidently true and universally valid moral principles. In this respect, human rights may be perceived as empirical facts about the contemporary world. Human rights do exist and many people do act in accordance with the correlative duties and obligations respecting human rights entails. No supporter of human rights could possibly complain about such perceptions. If nothing

else, the prevalence of such views is pragmatically valuable for the cause of human rights. However, moral philosophers do not enjoy such licence for epistemological complacency. Moral philosophers remain concerned by the question of the philosophical foundations of human rights. There is a good reason why we should all be concerned with such a question. What might be termed the 'philosophically naïve' view of human rights effectively construes human rights as legal rights. The validity of human rights is closely tied to, and dependent upon, the legal codification of human rights.

However, as was argued earlier, such an approach is not sufficient to justify human rights. Arguments in support of the validity of any moral doctrine can never be settled by simply pointing to the empirical existence of particular moral beliefs or concepts. Morality is fundamentally concerned with what ought to be the case, and this cannot be settled by appeals to what is the case, or is perceived to be the case. From such a basis, it would have been very difficult to argue that apartheid South Africa, to take an earlier example, was a morally unjust regime. One must not confuse the law with morality, *per se*. Nor consider the two to be simply co-extensional. Human rights originate as moral rights.

Human rights claim validity everywhere and for everyone, irrespective of whether they have received comprehensive legal recognition, and even irrespective of whether everyone is agreement with the claims and principles of human rights. Thus, one cannot settle the question of the philosophical validity of human rights by appealing to purely empirical observations upon the world. As a moral doctrine, human rights have to be demonstrated to be valid as norms and not facts. In order to achieve this, one has to turn to moral philosophy. Presently, two particular approaches to the question of the validity of human rights predominate: what might be loosely termed the 'interests theory approach' and the 'will theory approach'.

The Interests Theory Approach

Advocates of the interests theory approach argue that the

principal function of human rights is to protect and promote certain essential human interests. Securing human beings' essential interests is the principal ground upon which human rights may be morally justified. The interests approach is thus primarily concerned to identify the social and biological prerequisites for human beings leading a minimally good life. The universality of human rights is grounded in what are considered to be some basic, indispensable, attributes for human well-being, which all of us are deemed necessarily to share.

Take, for example, an interest each of us has in respect of our own personal security. This interest serves to ground our claim to the right. It may require the derivation of other rights as prerequisites to security, such as the satisfaction of basic nutritional needs and the need to be free from arbitrary detention or arrest, for example. The philosopher John Finnis provides a good representative of the interests theory approach. Finnis argues that human rights are justifiable on the grounds of their instrumental value for securing the necessary conditions of human well-being. He identifies seven fundamental interests, or what he terms 'basic forms of human good', as providing the basis for human rights.

These are: life and its capacity for development; the acquisition of knowledge, as an end in itself; play, as the capacity for recreation; aesthetic expression; sociability and friendship; practical reasonableness, the capacity for intelligent and reasonable thought processes; and finally, religion, or the capacity for spiritual experience. Finnis, these are the essential prerequisites for human well-being and, as such, serve to justify our claims to the corresponding rights, whether they be of the claim right or liberty right variety.

Other philosophers who have defended human rights from an interests-based approach have addressed the question of how an appeal to interests can provide a justification for respecting and, when necessary, even positively acting to promote the interests of others. Such questions have a long heritage in western moral and political philosophy and extend at least as far back as the 17th century philosopher Thomas

Hobbes. Typically, this approach attempts to provide what James Nickel has termed 'prudential reasons' in support of human rights. Taking as the starting point the claim that all human beings possess basic and fundamental interests, advocates of this approach argue that each individual owes a basic and general duty to respect the rights of every other individual. The basis for this duty is not mere benevolence or altruism, but individual self-interest.

As Nickel writes, 'a prudential argument from fundamental interests attempts to show that it would be reasonable to accept and comply with human rights, in circumstances where most others are likely to do so, because these norms are part of the best means for protecting one's fundamental interests against actions and omissions that endanger them.' Protecting one's own fundamental interests requires others' willingness to recognize and respect these interests, which, in turn, requires reciprocal recognition and respect of the fundamental interests of others. The adequate protection of each individual's fundamental interests necessitates the establishment of a co-operative system, the fundamental aim of which is not to promote the common good, but the protection and promotion of individuals' self-interest.

For many philosophers the interests approach provides a philosophically powerful defence of the doctrine of human rights. It has the apparent advantage of appealing to human commonality, to those attributes we all share, and, in so doing, offers a relatively broad-based defence of the plethora of human rights considered by many to be fundamental and inalienable. The interests approach also provides for the possibility of resolving some of the potential disputes which can arise over the need to prioritise some human rights over others. One may do this, for example, by hierarchically ordering the corresponding interests identified as the specific object, or content, of each right.

However, the interests approach is subject to some significant criticisms. Foremost amongst these is the necessary appeal interests' theorists make to some account of human nature. The interests-approach is clearly operating with, at the

very least, an implicit account of human nature. Appeals to human nature have, of course, proven to be highly controversial and typically resist achieving the degree of consensus required for establishing the legitimacy of any moral doctrine founded upon an account of human nature. For example, combining the appeal to fundamental interests with the aspiration of securing the conditions for each individual leading a minimally good life would be complicated by social and cultural diversity.

Clearly, as the economic philosopher Amartya Sen has argued, the minimal conditions for a decent life are socially and culturally relative. Providing the conditions for leading a minimally good life for the residents of Greenwich Village would be significantly different to securing the same conditions for the residents of a shanty town in Southern Africa or South America. While the interests themselves may be ultimately identical, adequately protecting these interests will have to go beyond the mere specification of some purportedly general prerequisites for satisfying individuals' fundamental interests. Other criticisms of the interests approach have focused upon the appeal to self-interest as providing a coherent basis for fully respecting the rights of all human beings.

This approach is based upon the assumption that individuals occupy a condition of relatively equal vulnerability to one another. However, this is simply not the case. The model cannot adequately defend the claim that a self-interested agent must respect the interests of, for example, much less powerful or geographically distant individuals, if she wishes to secure her own interests. On these terms, why should a purely self-interested and over-weight individual in, say, Los Angeles or London, care for the interests of a starving individual in some distant and impoverished continent? In this instance, the starving person is not in a position to affect their overweight counterpart's fundamental interests.

The appeal to pure self-interest ultimately cannot provide a basis for securing the universal moral community at the heart of the doctrine of human rights. It cannot justify the claims of universal human rights. An even more philosophically oriented vein of criticism focuses upon the interests' based approach

alleged neglect of constructive human agency as a fundamental component of morality generally. Put simply, the interests-based approach tends to construe our fundamental interests as pre-determinants of human moral agency.

This can have the effect of subordinating the importance of the exercise of freedom as a principal moral ideal. One might seek to include freedom as a basic human interest, but freedom is not constitutive of our interests on this account. This particular concern lies at the heart of the so-called 'will approach' to human rights.

The Will Theory Approach

In contrast to the interests approach, the will theory attempts to establish the philosophical validity of human rights upon a single human attribute: the capacity for freedom. Will theorists argue that what is distinctive about human agency is the capacity for freedom and that this ought to constitute the core of any account of rights. Ultimately, then, will theorists view human rights as originating in, or reducible to, a single, constitutive right, or alternatively, a highly limited set of purportedly fundamental attributes. H.L.A. Hart, for example, inferentially argues that all rights are reducible to a single, fundamental right.

He refers to this as 'equal right of all men to be free.' Hart insists that rights to such things as political participation or to an adequate diet, for example, are ultimately reducible to, and derivative of, individuals' equal right to liberty. Henry Shue develops upon Hart's inferential argument and argues that liberty alone is not ultimately sufficient for grounding all of the rights posited by Hart. Shue argues that many of these rights imply more than mere individual liberty and extend to include security from violence and the necessary material conditions for personal survival. Thus, he grounds rights upon liberty, security, and subsistence.

The moral philosopher Alan Gewirth has further developed upon such themes. Gewirth argues that the justification of our claims to the possession of basic human rights is grounded in what he presents as the distinguishing

characteristic of human beings generally: the capacity for rationally purposive agency. Gewirth states that the recognition of the validity of human rights is a logical corollary of recognizing oneself as a rationally purposive agent since the possession of rights are the necessary means for rationally purposive action. Gewirth grounds his argument in the claim that all human action is rationally purposive. Every human action is done for some reason, irrespective of whether it be a good or a bad reason.

He argues that in rationally endorsing some end, one must logically endorse the means to that end; as a bare minimum one's own literacy. He then asks what is required to be a rationally purposive agent in the first place? He answers that freedom and well-being are the two necessary conditions for rationally purposive action. Freedom and well-being are the necessary means to acting in a rationally purposive fashion. They are essential prerequisites for being human, where to be human is to possess the capacity for rationally purposive action. As essential prerequisites, each individual is entitled to have access to them. However, Gewirth argues that each individual cannot simply will their own enjoyment of these prerequisites for rational agency without due concern for others. He bases the necessary concern for others' human rights upon what he terms the 'principle of generic consistency'.

Gewirth argues that each individual's claim to the basic means for rationally purposive action is based upon an appeal to a general, rather than, specific attribute of all relevant agents. I cannot logically will my own claims to basic human rights without simultaneously accepting the equal claims of all rationally purposive agents to the same basic attributes. Gewirth has argued that there exists an absolute right to life possessed separately and equally by all of us. In so claiming, Gewirth echoes Dworkin's concept of rights as trumps, but ultimately goes further than Dworkin is prepared to do by arguing that the right to life is absolute and cannot, therefore, be overridden under any circumstances.

He states that a 'right is absolute when it cannot be overridden in any circumstances, so that it can never be

justifiably infringed and it must be fulfilled without any exceptions.' Will theorists then attempt to establish the validity of human rights upon the ideal of personal autonomy: rights are a manifestation of the exercise of personal autonomy. In so doing, the validity of human rights is necessarily tied to the validity of personal autonomy. On the face of it, this would appear to be a very powerful, philosophical position. After all, as someone like Gewirth might argue, critics of this position would themselves necessarily be acting autonomously and they cannot do this without simultaneously requiring the existence of the very means for such action: even in criticizing human rights one is logically pre-supposing the existence of such rights.

Despite the apparent logical force of the will approach, it has been subjected to various forms of criticism. A particularly important form of criticism focuses upon the implications of will theory for so-called 'marginal cases'; human beings who are temporarily or permanently incapable of acting in a rationally autonomous fashion. This would include individuals who have diagnosed from suffering from dementia, schizophrenia, clinical depression, and, also, individuals who remain in a comatose condition, from which they may never recover.

If the constitutive condition for the possession of human rights is said to be the capacity for acting in a rationally purposive manner, for example, then it seems to logically follow, that individuals incapable of satisfying this criteria have no legitimate claim to human rights. Many would find this conclusion morally disturbing. However, a strict adherence to the will approach is entailed by it.

Some human beings are temporarily or permanently lacking the criteria Gewirth, for instance, cites as the basis for our claims to human rights. It is difficult to see how they could be assimilated within the community of the bearers of human rights on the terms of Gewirth's argument. Despite this, the general tendency is towards extending human rights considerations towards many of the so-called 'marginal cases'. To do otherwise would appear to many to be intuitively wrong,

if not ultimately defensible by appeal to practical reason. This may reveal the extent to which many peoples' support of human rights includes an ineluctable element of sympathy, taking the form of a general emotional concern for others. Thus, strictly applying the will theorists' criteria for membership of the community of human rights bearers would appear to result in the exclusion of some categories of human beings who are presently recognized as legitimate bearers of human rights.

The interests theory approach and the will theory approach contain strengths and weaknesses. When consistently and separately applied to the doctrine of human rights, each approach appears to yield conclusions that may limit or undermine the full force of those rights. It may be that philosophical supporters of human rights need to begin to consider the potential philosophical benefits attainable through combining various themes and elements found within these philosophical approaches to justifying human rights. Thus, further attempts at justifying the basis and content of human rights may benefit from pursuing a more thematically pluralist approach than has typically been the case to date.

PHILOSOPHICAL CRITICISMS OF HUMAN RIGHTS

The doctrine of human rights has been subjected to various forms of fundamental, philosophical criticism. These challenges to the philosophical validity of human rights as a moral doctrine differ from critical appraisals of the various philosophical theories supportive of the doctrine for the simple reason that they aim to demonstrate what they perceive to the philosophical fallacies upon which human rights are founded. Two such forms of critical analysis bear particular attention: one which challenges the universalist claims of human rights, and another which challenges the presumed objective character of human rights principles.

Moral Relativism

Philosophical supporters of human rights are necessarily

committed to a form of moral universalism. As moral principles and as a moral doctrine, human rights are considered to be universally valid. However, moral universalism has long been subject to criticism by so-called moral relativists. Moral relativists argue that universally valid moral truths do not exist. For moral relativists, there is simply no such thing as a universally valid moral doctrine. Relativists view morality as a social and historical phenomenon. Moral beliefs and principles are therefore thought of as socially and historically contingent, valid only for those cultures and societies in which they originate and within which they are widely approved.

Relativists point to the vast array of diverse moral beliefs and practices apparent in the world today as empirical support for their position. Even within a single, contemporary society, such as the United States or Great Britain, one can find a wide diversity of fundamental moral beliefs, principles, and practices. Contemporary, complex societies are thus increasingly considered to be pluralist and multicultural in character. For many philosophers the multicultural character of such societies serves to fundamentally restrict the substance and scope of the regulative political principles governing those societies. In respect of human rights, relativists have tended to focus upon such issues as the presumed individualist character of the doctrine of human rights.

It has been argued by numerous relativists that human rights are unduly biased towards morally individualist societies and cultures, at the necessary expense of the communal moral complexion of many Asian and African societies. At best, some human rights' substances may be considered to be redundant within such societies, at worse they may appear to be positively harmful if fully implemented, replacing the fundamental values of one civilization with those of another and thereby perpetuating a form of cultural and moral imperialism.

The philosophical debate between universalists and relativists is far too complex to adequately summarise here. However, certain immediate responses to the relativist critique of human rights are immediately available. First, merely pointing to moral diversity and the presumed integrity of

individual cultures and societies does not, by itself, provide a philosophical justification for relativism, nor a sufficient critique of universalism. After all, there have existed and continue to exist many cultures and societies whose treatment of their own people leaves much to be desired. Is the relativist genuinely asking us to recognize and respect the integrity of Nazi Germany, or any other similarly repressive regime? There can be little doubt that, as it stands, relativism is incompatible with human rights. On the face of it, this would appear to lend argumentative weight to the universalist support of human rights.

After all, one may speculate as to the willingness of any relativist to actually forego their possession of human rights if and when the social surroundings demanded it. Similarly, relativist arguments are typically presented by members of the political elites within those countries whose systematic oppression of their peoples has attracted the attention of advocates of human rights. The exponential growth of grass-roots human rights organizations across many countries in the world whose cultures are alleged to be incompatible with the implementation of human rights, raises serious questions as to the validity and integrity of such 'indigenous' relativists. At its worst, the doctrine of moral relativism may be being deployed in an attempt to illegitimately justify oppressive political systems.

The concern over the presumed incompatibility between human rights and communal moral systems appears to be a more valid issue. Human rights have undeniably conceived of the principal bearer of human rights as the individual person. This is due, in large part, to the Western origins of human rights. However, it would be equally fair to say that the so-called 'third generation' of human rights is far more attuned to the communal and collective basis of many individuals' lives.

In keeping with the work of political philosophers such as Will Kymlicka, there is increasing awareness of the need to tailor human rights principles to such things as the collective rights of minorities and, for example, these minorities' claims to such things as communal land rights. While human rights

remain philosophically grounded within an individualist moral doctrine, there can be no doubt that attempts are being made to adequately apply and human rights to more communally oriented societies. Human rights can no longer be accused of being 'culture-blind'.

Epistemological Criticisms of Human Rights

The second most important contemporary philosophical form of human rights' criticism challenges the presumed objective basis of human rights as moral rights. This form of criticism may be thought of as a river into which run many philosophical tributaries. The essence of these attempts to refute human rights consists in the claim that moral principles and concepts are inherently subjective in character. On this view moral beliefs do not emanate from a correct determination of a rationally purposive will, or even gaining insight into the will of some divine being. Rather, moral beliefs are fundamentally expressions of individuals' partial preferences. This position therefore rejects the principal ground upon which the concept of moral rights rests: that there exist rational and *a priori* moral principles upon which a correct and legitimate moral doctrine is to be founded.

In modern, as opposed to ancient, philosophy this argument is most closely associated with the 18th century Scottish philosopher David Hume. More recently versions of it have been defended by the likes of C.L. Stevenson, Ludwig Wittgenstein, J.L. Mackie, and Richard Rorty. Indeed, Rorty has argued that human rights are based not upon the exercise of reason, but a sentimental vision of humanity. He insists that human rights are not rationally defensible.

He argues that one cannot justify the basis of human rights by appeal to moral theory and the canons of reason since, he insists, moral beliefs and practices are not ultimately motivated by an appeal to reason or moral theory, but emanate from a sympathetic identification with others: morality originates in the heart, and not in the head. Interestingly, though unambiguously sceptical about the philosophical basis of human rights, Rorty views the existence of human rights as a

'good and desirable thing', something whose existence we all benefit from. His critique of human rights is this not motivated by an underlying hostility to the doctrine. For Rorty, human rights are better served by emotional appeals to identify with the unnecessary suffering of others, than by arguments over the correct determination of reason.

Rorty's emphasis upon the importance of an emotional identification with others is a legitimate concern. It may, for example, provide additional support for the philosophical arguments presented by the likes of Gewirth. However, as Michael Freeman has recently pointed out, 'Rorty's argument...confuses *motivation* and *justification*. Sympathy is an emotion. Whether the action we take on the basis of our emotions is justified depends on the reasons for the action. Rorty wishes to eliminate unprovable metaphysical theories from philosophy, but in his critique of human-rights theory he goes too far, and eliminates reasoning.' Rorty's own account of the basis and scope of moral knowledge ultimately prohibits him from claiming that human rights is a morally desirable phenomenon, since he explicitly rules out the validity of appealing to the independently verifiable criteria required to uphold any such judgement. What we require from Rorty is an independent reason for accepting his conclusion. It is precisely this that he denies may be legitimately provided by moral philosophy.

Rorty aside, the general critique of moral objectivity has a long and very well-established heritage in modern moral philosophy. It would be false to claim that either the objectivists or the subjectivists have scored any ultimate 'knock-down' over their philosophical opponents. Human rights are founded upon the claim to moral objectivity, whether by appeal to interests or the will.

Any critique of moral objectivism is bound, therefore, to have repercussions for the philosophical defence of human rights. Philosophers such as Alan Gewirth and John Finnis, in their separate and different ways, have attempted to establish the rational and objective force of human rights. The reader interested in pursuing this particular theme further is therefore

recommended to pursue a close philosophical analysis of either, or both, of these two philosophers.

CONCLUSION

Human rights have a long historical heritage. The principal philosophical foundation of human rights is a belief in the existence of a form of justice valid for all peoples, everywhere. In this form, the contemporary doctrine of human rights has come to occupy centre stage in geo-political affairs. The language of human rights is understood and utilized by many peoples in very diverse circumstances. Human rights have become indispensable to the contemporary understanding of how human beings should be treated, by one another and by national and international political bodies. Human rights are best thought of as potential moral guarantees for each human being to lead a minimally good life. The extent to which this aspiration has not been realised represents a gross failure by the contemporary world to institute a morally compelling order based upon human rights. The philosophical basis of human rights has been subjected to consistent criticism.

While some aspects of the ensuing debate between philosophical supporters and opponents of human rights remain unresolved and, perhaps, irresolvable, the general case for human rights remains a morally powerful one. Arguably, the most compelling motivation for the existence of human may rest upon the exercise of imagination. Try imagining a world without human rights!

Chapter 2

Importance of Human Rights in Democracy and Development

INTRODUCTION

There is now an acceptance among the international community about the centrality of human rights and their importance in democracy and development. This part explores the link between human rights, democracy, good governance and pro-poor development. It emphasizes that human rights protection is indispensable to entrenching substantive democracy and promoting pro-poor development.

COMMON ROOTS OF DEMOCRACY AND HUMAN RIGHTS

> "My notion of democracy is that under it the weakest should have the same opportunity as the strongest."
>
> — Mahatma Gandhi (1869-1948), leader of India's non-violent struggle for freedom.

The greatest protection of human rights emanates from a democratic framework grounded in the rule of law. A functional democracy that accommodates diversity is increasingly becoming the planet's best bet against the concentration of power in the hands of a few and the abuse that inevitably results from it. The Commonwealth too, rejects foreign domination, authoritarian dictatorships, military regimes and one-party rule. All nations of the Commonwealth have chosen democracy as their preferred form of government and this is affirmed in the official position that undemocratic nations are not welcome in this community of nations wedded to the principles of liberty and democratic political processes

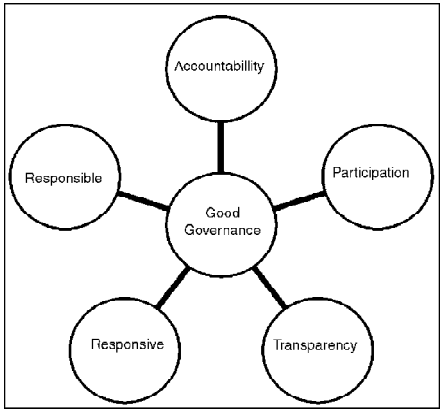
that are spelt out in the Singapore Declaration, 1971. Yet the challenge before the Commonwealth today is to deepen this democracy from just its basic electoral form into a common enterprise between people and government. While the strength and level of democracy in different parts of the Commonwealth may vary, the human rights framework offers the key means to move from basic electoral democracy to the fully-fledged version. The principle that 'all power ultimately rests with the people and must be exercised with their consent' lies at the heart of democracy. Democracy is premised on the recognition and protection of people's right to have a say in all decision making processes which is itself based on the central principle of equality of all human beings. The exercise of this fundamental political right requires a guarantee of crucial freedoms—to express one's thoughts and opinion without fear, to seek and receive information, to form associations and to assemble in a peaceful manner to discuss public affairs amongst others. Accommodation of the views of minorities is essential to prevent democracy from degenerating into despotism by the majority. The purpose of democracy like that of human rights protection is to uphold the dignity of every individual and to ensure that the voices of the weakest are also heard. Its core values—freedom, equality, fraternity, accommodation of diversity and the assurance of justice underpin the norms of human rights as well.

DEMOCRACY, GOOD GOVERNANCE AND HUMAN RIGHTS

Across the Commonwealth democracy is endorsed, as in the Harare Declaration as the only legitimate means of governance. Democracy is no longer equated with the mere ability to hold regular elections—this is just the starting point. The Commonwealth has recognized that to be meaningful, mere representative democracy must deepen into substantive and participatory democracy. As the Commonwealth Expert Group in Democracy and Development stated: "The scope of democracy must...be widened beyond elections, so that democratic institutions and processes facilitate, protect and

reinforce the full range of human rights." The goals of human rights are sometimes summed up as freedom from fear and want and to be able to develop one's potential. These are also the aims of governance. Governance is much more than the business of running the State machinery to keep one's borders safe and the law and order situation under control.

States also have the mandate to eliminate inequalities and inequities entrenched in society that results in the exploitation and the marginalization of certain groups, depriving them of basic rights to a life of dignity. In addition, States have, at the international level, undertaken to guarantee protection for the human rights of all citizens. The test of governance is the degree to which the State machinery delivers on these commitments. Every human right corresponds to a human aspiration and a norm of treatment to which everyone is entitled. The international human rights regime, which is continuously evolving with the progress of time, provides universally accepted legal standards against which the performance of the State machinery can be measured. At a minimum, parliamentarians in a democracy must actively work to promote people's welfare, rejecting all forms of discrimination and exclusion, facilitate development with equity and justice, and encourage the most comprehensive and full participation of citizens in decision-making and action on diverse issues affecting society.



Good governance requires that all work of the State be

informed by fundamental democratic principles underpinning human rights. The five pillars of good governance–transparency in decision-making processes, ensuring people's participation, responsibility in the exercise of power, accountability of the decision-makers and responsiveness to people's needs–uphold the edifice of sustainable democracy. Anything less will result in despotism and tyranny of power. A human rights lens on democracy and governance not only privileges justice and equity but most importantly takes the provision for human well-being by governments from mere promises into the realm of precise legal obligation.

HUMAN RIGHTS AND PRO-POOR DEVELOPMENT

Poverty is a brutal denial of human rights. This must be recognized at the outset by all policy-makers, including governments, donor agencies, international organizations and individual parliamentarians. Poverty is a condition generated by chronic situations where individuals, families and entire communities are deprived, often resulting in homelessness, lack of education, poor-health, lack of opportunities for livelihood, and the inability to access public services or indeed justice itself. Each of these conditions corresponds to the violation of internationally recognized human rights standards namely, the right to adequate housing, the right to educational opportunities, the right to health facilities, the right to work, the right to livelihood, the right of equal access to public services and the right to seek justice.

POVERTY AND THE COMMONWEALTH

Most people living in the Commonwealth today are poor. Too many of them are among the absolute poor. A third of the 200 million citizens of the Commonwealth live on less than US$1 a day–the internationally accepted measure of extreme poverty. There are also significant pockets of poverty in the richer states like the UK, Canada, Australia and New Zealand. As many people have pointed out poverty is much more than just lack of income. Poverty is a condition brought about by

people and policies and is not a natural and normal condition. It can and must be changed as a matter of priority.

The state of poverty itself, and not the act to eliminate it, is a violation of human rights. Development sees human beings as having needs that should be fulfilled where possible. Human rights ensure that these become legal obligations of the duty holder—namely the State—against which claims can be made. South Africa and Uganda have recognized the human rights to food, housing, health care, education and a clean and safe environment by writing them into their constitutions as fundamental rights that the State is legally obligated to provide for all citizens.

In other countries like India and Bangladesh where non-binding constitutional directives to achieve similar goals exist, the judiciary has expanded the scope of the fundamental right to life to include some of these basic entitlements indispensable for the enjoyment of a life of dignity. Despite this, poverty reduction efforts have traditionally been guided by the paternalist 'welfare' approach where the State becomes the benefactor of the poor who must wait upon the generosity and goodwill of the giver.

In some countries with high incidence of poverty this approach has degenerated to distribution of patronage for buying support and approval for those wielding State power. The accent is also placed on 'reduction' rather than 'eradication' of poverty. A charitable approach to development also allows richer nations to keep development assistance at the level of grace and favour, reinforcing dependencies and sharpening misleading perceptions of the alleged inadequacies of the developing world. In contrast, the rights based approach is by definition pro-poor in nature as it requires developmental planning to target the weakest and the most vulnerable first and foremost.

Human rights standards provide the benchmarks against which success of development policies must be measured. Setting targets based on human rights allows policy makers to create realistic frameworks for achieving rights and making informed evaluations of the effectiveness of their policies and

programmes. Situating development and poverty alleviation within a human rights framework gives primacy to the participation and empowerment of the poor, insists on democratic practices, and ensures that the rationale of poverty reduction no longer derives only from the fact that the poor have needs, but is based on the rights of all through entitlements that give rise to obligations on the part of international community, nation-states, the commercial sector and local communities and associations as enshrined in law.

APPROACHES TO POVERTY

Rights-Based Approach:

- Developmental planning to target vulnerable communities.
- Focus on right to live a life free of poverty.
- Obliges the international community, nation states, the commercial sector and local communities and associations to provide for impoverished communities as enshrined in law.

Welfare Approach:

- Giver determines level of generosity.
- Focus on 'reduction' rather than 'eradication' of poverty.
- Reinforces dependencies by making state the benefactor of the poor.

ROLE OF PARLIAMENTARIANS

Most Commonwealth parliamentarians, whether indirectly as donors or directly as representatives, are closely associated with designing policies that are aimed at rapid economic development and poverty eradication. They face complicated tasks and difficult choices in delivering development, which is more than optimizing economic growth, but aims at equitable distribution of wealth coupled with social justice. The human rights regime provides a matrix from which to make this happen. The onus for furthering good governance, which requires effective, honest, just, equitable and accountable exercise of power by the State agencies lies within the mandate

of parliamentarians. As elected representatives, parliamentarians have the fundamental responsibility to voice the aspirations of the people in parliament and to always act in their interests. The human right lens equips parliamentarians to set, examine and evaluate the policies and actions of the executive to see they meet the criteria of good governance and that the outcomes stand the test of equity and justice. Not only should human rights be realised for their own sake, these rights offer parliamentarians a framework to entrench democracy in its fullest form.

Chapter 3

Universal Human Rights Standards

AN OVERVIEW

This part covers the international human rights treaties and the rights they protect. It emphasises that there is international consensus and agreement on the meaning and scope of human rights. This has been distilled into an international human rights legal framework that sets standards, which are the minimum for all nations to follow. The part traces the development of these standards in the United Nations, from the Universal Declaration of Human Rights in 1948 to the present. The part shows the various rights that make up the contemporary definition of human rights that is based on a shared international understanding. It indicates that the State is mandated to protect the human rights of all from violations by State and non-State actors.

It outlines the international legal framework of human rights comprising the Universal Declaration of Human Rights and the seven core international human rights treaties, as well as the workings of the treaty system, including the responsibilities that come with ratification and the committees that provide the mechanism to invoke State responsibility to uphold human rights standards. In addition, this part also provides links to other United Nations documents, conventions, guidelines and rules that protect human rights.

INTERNATIONAL LEGAL FRAMEWORK FOR HUMAN RIGHTS

Inherent to membership of the international communities

such as the United Nations, or regional groupings such as the African Union, the European Union, the Pacific Islands Forum, the Organization of American States, and the Commonwealth, is the recognition that the State has a central role in the protection, promotion and fulfillment of human rights. The principal duty to put in place the necessary institutions and mechanisms to make human rights a reality lies with the State. It has a responsibility not only to ensure that its agents, whether they are the police, the army or civil administration, abide by internationally recognized standards, but also to ensure that others such as private companies, religious or ethnic groups or individuals, do not infringe the human rights of any person or community of persons.

The idea that such private bodies have duties too is a recent one. While the international human rights regime is structured around the concept of the State, which has the primary responsibility to protect human rights, norms have been developed for transnational corporations and other businesses. The international human rights obligations to which States commit impose a duty on incountry law making bodies at the national or provincial levels to formulate policies, draft laws, establish institutions that actively promote and protect the human rights of individuals and communities. This is part of a country's obligation to the international community.

UNIVERSAL HUMAN RIGHTS STANDARDS

The main international framework for human rights has been developed through the United Nations (UN). From its inception in 1945, the UN has affirmed its commitment to human rights. This is apparent most significantly through the drafting of the Universal Declaration of Human Rights.

Universal Declaration of Human Rights (UDHR)

The UDHR is a ground-breaking document adopted by the UN General Assembly in 1948. It is actually a statement of principles on which to base a new world order that is designed to prevent the atrocities of the two world wars from being repeated. The UDHR states that "recognition of the inherent

dignity and of the equal and unalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." It is the well spring from which all international treaties and declarations on human rights have emanated.

The UDHR outlines minimum standards of human rights that each State must protect all people no matter who they are, what they do or from where they come. With time, the standards laid down in the UDHR have been refined and included in separate documents that guarantee civil and political rights, economic social and cultural rights, rights against racial discrimination, women's rights, children's rights, rights against torture, rights of migrant workers and more.

These documents, which are also called instruments, give human rights prominence and international legitimacy. Some, like the early International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are broad in content, while others more recently focus on one particular theme. Together, they lay out the international community's agreement on particular issues.

Classifications of UN Instruments

UN instruments can be classified in different ways, including:

- Covenants, statutes, protocols and conventions–these are legally-binding for states that have ratified or acceded to them.
- Declarations, principles, guidelines, standard rules and recommendations–these have a strong moral force and provide practical guidance to states, although they may not have binding legal effect under international law.

SIGNING, RATIFYING AND ACCEDING TO TREATIES

Membership of the United Nations automatically means that a country accepts and subscribes to the principles of the Universal Declaration of Human Rights. However, specific

obligations arise when treaties and covenants are signed, accessed, or ratified by countries. State involvement in treaties signifies a country's acceptance to abide by the international human rights regime, its commitment to the international community and to protecting the human rights of people living in-country in accordance with its principles.

Reservations

A State may, when signing, ratifying or acceding to a treaty, formulate a reservation. This means that the State, while accepting the standards laid down in the treaty expresses its desire not to adhere to a particular substance, part or clause in the treaty on the grounds that they do not confirm with customary laws or with the constitutional provisions of that country.

Bangladesh, for instance, made reservations to the Convention on the Elimination of All Forms of Discrimination Against Women which calls upon States to embody the principle of equality between men and women in their national constitutions and laws among other things on the grounds that it conflicts with Sharia law, or Islamic law. Reservations are only allowed if not expressly prohibited under the treaty and if not incompatible with the object and purpose of the treaty. When a reservation is considered to be so broad that it negates the purpose of the treaty other countries may call it into question and object.

Another example of a reservation is The Gambia which has entered reservations to section 14 (3)(d) of the International Covenant on Civil and Political Rights which guarantees free legal aid to accused persons with insufficient means to defend themselves, on the grounds that the Constitution of the Gambia limits free legal assistance to only persons charged with capital offences, even though this arguably contravenes due process and the fundamental right to a fair trial guaranteed in the Universal Declaration of Human Rights. The cause of human rights is greatly strengthened if countries whole-heartedly ratify international treaties without recording reservations, which go against the spirit of universality, inalienability and indivisibility

of human rights. The World Conference on Human Rights has in fact called upon States to "consider limiting the extent of any reservations they lodge to international human rights instruments, formulate any reservations as precisely and narrowly as possible, ensure that none is incompatible with the object and purpose of the relevant treaty and regularly review any reservations with a view to withdrawing them".

CORE TREATIES

The International Bill of Rights

The International Bill of Rights comprises the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights with its two optional protocols. Membership of the international community implies a corresponding duty to abide by the rights guaranteed in the Bill of Rights. The rights outlined in the International Bill of Rights may be limited in specific circumstanced in the interest of morality, public order and the general welfare in a democratic society. However, there are certain rights that can never be suspended or limited, even in emergency situations.

These non-derogable rights are:

- The right to life;
- The right to freedom from torture;
- The right to freedom from enslavement or servitude;
- The right to protection from imprisonment for debt;
- The right to freedom from retroactive penal laws;
- The right to recognition as a person before the law;
- The right to freedom of thought, conscience and religion.

At present, in addition to the Universal Declaration of Human Rights—which is the seminal international human rights document—there are seven core human rights treaties. These were first adopted by the General Assembly of the United Nations, but, like all treaties, did not come into force until ratification by a certain number of states, usually between 20 and 35, depending on the treaty. These treaties articulate

not only the human rights standards but also the obligations on States, and additionally provide for a committee to be set up to monitor how that treaty is being implemented. These committees are referred to as treaty-monitoring bodies and along with each treaty.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

This treaty came into force in 1969. It is intended to prevent any kind of discrimination and racism. It states that any doctrine of racial differentiation or superiority is false, morally condemnable, socially unjust and dangerous and cannot be justified in theory or in practice.

It requires countries to condemn all forms of racial discrimination, whether based on race, colour, descent, or national or ethnic origin, and to work towards eliminating racial discrimination. States must guarantee everyone's right to equality before the law, and to various political, civil, economic, social and cultural rights. The ICERD recognizes that affirmative action measures may be necessary to achieve these ends.

The Committee on the Elimination of Racial Discrimination (CERD)

This committee monitors how States fulfil their human rights obligations under the treaty and requires reports every two years. The Committee hears individual complaints of violations and also accepts complaints from one State about racial discrimination in another. It also has an early-warning procedure to be able to quickly respond to serious, urgent incidents.

International Covenant on Civil and Political Rights (ICCPR)

This treaty was adopted by the UN General Assembly in 1966 and came into force in 1976. It guarantees civil and political rights, which include: the right to life and to be free from torture, the right to equality and to be to be treated

equally under the law, the right to self-determination and the rights of minorities, the right to privacy, the right to vote and to be part of governance, and the freedom of expression, religion and association. The ICCPR also has two optional protocols: one relating to individual complaints (if a country agrees to this Optional Protocol, then individuals can send complaints of violation in that country to the committee) and one relating to abolition of the death penalty.

The treaty also explains the obligations of States and provides for a Human Rights Committee to monitor how states comply with the treaty. All countries that are party to the ICCPR must report to the Human Rights Committee every five years on what they have done to promote these human rights and about the progress made. The Committee reviews these reports in public meetings, including representatives of the state whose report is being reviewed.

Rights of the ICCPR:

- Life
- No torture
- Equality
- Equal justice
- Self-determination
- Equality for minorities
- Privacy
- Democratic vote
- Free expression
- Religion
- Association

International Covenant on Economic, Social and Cultural Rights (ICESCR)

This treaty was adopted at the same time as the ICCPR, and also came into force in 1976. The economic, social and cultural rights in this document include: the right to work with fair conditions and to form trade unions, the right to an adequate standard of living including food, clothing and housing, the right to education, and the right to marry and to participate in cultural life.

The Committee on Economic, Social and Cultural Rights

This committee monitors the implementation of this treaty and requires countries to submit reports to the Committee every five years outlining the legislative, judicial, policy and other measures taken towards fulfilling their obligations. This Committee does not take up individual complaints, as ECOSOC to which the Committee reports, but it encourages economic, social and cultural rights to be progressively realised. However, increasing advocacy around this may lead to an Optional Protocol which would create an international complaint mechanism against violations of economic, social and cultural rights, similar to that which exists for the ICCPR.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

This came into force in 1981 and defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which impairs or stops the recognition, enjoyment or exercise by women of any human right or fundamental freedom". Under the treaty, States must adopt legislation prohibiting all forms of discrimination against women, and must not act in a way that is discriminatory to women. However, CEDAW has the maximum reservations of any treaty. While there are no non-derogable rights and there is no specific substance to which reservations are prohibited, incompatible reservations are not permitted. Some States have declared that they will not be bound by any provision that compels a change of law or that domestic law will prevail in case of conflict.

The Committee on the Elimination of Discrimination Against Women is the monitoring body for this treaty. All countries must submit reports to this committee every four years. The Committee can make suggestions and general recommendations on the implementation of the Convention; but cannot pronounce a State to be a violator of the Convention

and as such does not pressure individual States to change their policies and legislation. An Optional Protocol came into force in 2000, which means that the Committee can now investigate individual cases As long as they relate to a country that has agreed to the Optional Protocol.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

This treaty came into force in 1987. It describes torture as "any act which causes severe pain (physical or mental) to a person as a way of obtaining information or a confession, or to punish him/her for an act he/she or a third person has or is suspected of having committed". Torture could be aimed at intimidating the victim or a third party and is committed with the consent of a public official, but does not include suffering that comes about as a result of legal penalty. States that are party to the Convention are required to take action to prevent torture in their territory.

Of note is that exceptional or emergency circumstances such as war or an order from a superior officer cannot be used to justify torture. The Committee Against Torture reviews States' reports, which are submitted every four years. It considers individual complaints, as well as complaints from one State about another. An Optional Protocol to the Convention allows on-site visits to places of detention in countries that have agreed to the Optional Protocol.

Convention on the Rights of the Child (CRC)

This treaty came into force in 1990 and has more ratifications than any other convention as all but two members of the UN (USA and Somalia) have ratified it. The four guiding principles of the treaty are: nondiscrimination (no child should suffer discrimination under any circumstances); best interest of the child (in any decision by State authorities that affects a child, the best interest of the child must be the first consideration); right to life, survival and development (as well as basic survival this includes the child's positive mental, emotional, cognitive, social and cultural development); and the

views of the child (the views of the child on all matters affecting them should be considered, taking into account the age and maturity of the child). The CRC has two Optional Protocols: one on preventing the involvement of children in armed conflict; and one on the sale of children, child prostitution and child pornography. States must submit reports every five years to the Committee on the Rights of the Child on steps taken to put the Convention into practice and details of progress in their territories. The Committee operates under the guideline of the four principles laid down by the Convention and does not accept individual cases.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)

The newest of the core treaties, this came into force in 2003. It aims to prevent and end the exploitation of migrant workers (which includes both documented and undocumented migrants) throughout the entire migration process and lays out the obligations and responsibilities of both the sending and receiving States. In particular, it seeks to put an end to illegal or clandestine recruitment and trafficking of migrant workers and discourages the employment of migrant workers in an irregular or undocumented situation. The Committee on Migrant Workers monitors this treaty and requires reports from States every five years, and will, in certain circumstances, consider communications from individuals claiming that their rights under the Convention have been violated.

OTHER TREATIES

In addition to the International Bill of Rights and the core human rights treaties, the United Nations has stressed greater protection of human rights through conventions and declarations on specific issues. The UN also has prescribed standard basic minimum rules and principles to guide States in dealing with particular situations. There are many such instruments, of which some of the most relevant are listed following this unit.

While there are standards, these can't exist alone. There are committees to keep an eye on whether countries are fulfilling the obligations they have committed to themselves, but more is needed at both an international and regional level. Therefore, as explained in this Unit, the United Nations has other human rights bodies and mechanisms to complement the treaties and treaty-bodies. Regional organizations in Africa, Europe and the Americas have charters and conventions, and mechanisms to ensure that they are followed.

UN INSTITUTIONAL MECHANISMS TO PROTECT HUMAN RIGHTS

In principle, human rights have been accorded preeminence in the UN system. The UN Charter, declares:

> "We the peoples of the United Nations determined... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small... and to promote social progress and better standards of life in larger freedom".

However, despite this proclamation, real politik has often determined the direction of human rights in UN corridors and sometimes obstructed their causes. Nevertheless, the United Nations has been instrumental in developing legally-binding,

universal standards in the form of treaties and associated treaty-monitoring bodies. These mechanisms are constantly evolving to better respond to violations.

CHARTER-BASED BODIES

The Charter of the United Nations permits it to establish bodies to take note of emerging human rights issues, discuss and debate them, and evolve new standards around them. These are known as charter based bodies. The most important of these specifically for human rights, is the Commission on Human Rights. The Commission is made up of representatives of member-states and meets once a year. It provides policy guidelines, studies human rights problems and investigates violations, develops new international norms, and monitors the observance of human rights around the world. It has the power to criticize a state that violates human rights whether or not they have ratified any of the human rights treaties. Individuals and groups can send information to the Commission on violations of human rights, which they will investigate if it fits into their criteria for complaints.

There are a number of proposals for reform of the Commission in the recommendation of the UN's recent High-level Panel on Threats, Challenges and Change, including the publication of an annual global human rights report as well as changes to membership. The March 2005, report of the UN Secretary General titled, In Larger Freedom: towards development, security and human rights for all contains proposals to replace the Commission on Human Rights with a smaller standing Human Rights Council. As yet no change has happened. The Commission can set up 'special procedures', which refers to working groups or individuals (Special Reporters or Independent Experts) mandated to address specific country situations (currently no Commonwealth countries) or thematic issues. Thematic mandates include: Special Reporters on housing, right to food, freedom of religion, freedom of opinion and expression, independence of judges, and indigenous peoples; Working Groups on arbitrary detention, and disappearances; and many more. There are

currently over 30 special procedure mechanisms and all serve in their personal capacity. Their mandates vary, but they usually examine, advise, and publicly report on their specific area, and regularly conduct studies, respond to individual complaints, and promote their area of concern. From time to time they will also conduct country visits—this occurs either following a request from the relevant special procedure or at the invitation of the country concerned, and is reported back to the Commission. Some countries have extended standing invitations to all thematic special procedures of the Commission. The Sub-Commission on Human Rights is a subsidiary body of the Commission on Human Rights. Whereas the members of the Commission itself represent their countries, members of the Sub-commission are elected by the Commission and are independent experts who act in their personal capacity. They undertake studies on human rights topics and make recommendations to the Commission on Human Rights. There are currently six working groups of the Sub-Commission.

Office of the High Commissioner for Human Rights (OHCHR)

The Office of the High Commissioner for Human Rights is a focal point for all human rights activities in the UN and serves as the Secretariat for the Human Rights Commission and related bodies. The High Commissioner him/herself is the UN Secretary-General's personal representative on human rights and is, authorised to provide constant encouragement to the international community and States to uphold the universally agreed standards. The website of the OHCHR is a key resource for parliamentarians on the latest in human rights standards and trends.

Some other charter-based bodies relevant to human rights are:

- *General Assembly (GA)*: This is the equivalent of a parliament for the UN and is important to human rights as it can discuss violations, pass resolutions and establish bodies such as the Office of the High

Commissioner for Human Rights. The General Assembly also adopts documents that become the human rights standards. The Third Committee of the GA particularly deals with human rights issues.

- *Security Council*: This is a key UN body, which has passed state-building resolutions related to human rights, such as the establishment of the International Criminal Court, and the establishment of special tribunals to deal with heinous violations. The International Criminal Tribunal for the Former Yugoslavia, for instance, was set up following a Security Council resolution of 1993 to prosecute certain types of crime committed in the former Yugoslavia since 1991. The International Criminal Tribunal for Rwanda was also set up in 1994, and aims to prosecute the people responsible for genocide and other serious violations of international humanitarian law committed in Rwanda.
- *The International Court of Justice (ICJ)*: This institution was set up in 1945 under the UN Charter as a world court. It settles disputes submitted by States in accordance with international law and also gives legal advice to authorized agencies.
- *Economic and Social Council (ECOSOC)*: This group coordinates the work of UN specialized agencies and other bodies, and makes policy recommendations. Part of ECOSOC's area of responsibility is to encourage universal respect for human rights, particularly through its subsidiary bodies. As well as the Commission on Human Rights, these include the Commission on the Status of Women to make recommendations on promoting women's rights in political, economic, civil, social and educational fields.

UN Specialized Agencies are bodies set up by the UN to work on specific areas. Human rights are a cross-cutting issue across all Specialized Agencies.

The agencies include:

- *The International Labour Organization (ILO)*: This

organization focuses on labour issues and has adopted over 150 labour conventions which are the basis of international labour standards and can be ratified by ILO member states.

- *United Nations Educational, Scientific and Cultural* Organization (UNESCO): This UN organization promotes collaboration among nations through education, science and culture, which includes some work aimed at the promotion of human rights. Its Committee on Conventions and Recommendations receives complaints from groups or individuals about human rights violations in the educational, scientific, and cultural or information fields committed in member states.
- *The United Nations Development Programme (UNDP)*: This programme works to help develop the capacities required to achieve the Millennium Development Goals, which includes the integration of human rights with sustainable development.
- *United Nations Children's Fund (UNICEF)*: This programme is mandated by the UN General Assembly to advocate for the rights of children. It is guided by the Convention of the Rights of the Child, and is also involved in monitoring the Convention.
- *The UN High Commission for Refugees (UNHCR)*: This is the agency mandated to assist refugees as per the requirements of the 1951 Refugee Convention.
- *The World Health Organization (WHO)*: This group aims to help all people attain the highest possible level of health, and includes work on human rights.
- *The Food and Agriculture Organization (FAO)*: This organization works on nutrition and standards of living, agricultural productivity, and conditions for rural people including issues of rights.

Monitoring Human Rights Internationally

One of the most exciting recent examples of an international desire to engender greater protection of human

rights is the International Criminal Court (ICC), a permanent international criminal court set up to promote the rule of law and ensure that the gravest international crimes do not go unpunished. The ICC was set up under the Rome Statute, which was adopted in 1998 and came into force in 2002. It is designed to be complementary to national criminal jurisdictions.

Anyone who commits a crime under the Statute after 2002 can be prosecuted by the Court. The establishment of the ICC shows huge progress in global human rights at a conceptual and practical level as regimes and groups, guilty of committing genocide and crimes against humanity will now be liable in an international court. Though the ICC has been established by a process independent of the United Nations, the Rome Statute contains provisions that allow cases to be referred to the Court by the UN Security Council.

THE COMMONWEALTH AND HUMAN RIGHTS

As a voluntary association of states that had been earlier linked administratively to the United Kingdom, members of the Commonwealth have many commonalities in their legal and parliamentary systems. They also have a common stated commitment to human rights. The Commonwealth Heads of Government Meeting (CHOGM) is a Commonwealth summit every two years where broad policy direction is agreed, and the statements that have come out of these meetings partly relate to human rights. Some of these include.

THE CHOGM STATEMENTS

Declaration of Commonwealth Principles (1971)

This outlines the set of principles that bring together Commonwealth member states. These include the liberty of the individual and equal rights for all citizens, recognition of the need to act to bring about a more equitable society and a commitment "to foster human equality and dignity everywhere, and to further the principles of self-determination and non-racialism".

Lusaka Declaration on Racism (1979)

This is the main Commonwealth statement against all forms of racism, including the right to live freely in dignity and equality, the right to equality before the law, the right to remedies and protection against discrimination, and freedom of cultural diversity.

Harare Commonwealth Declaration (1991)

This declaration is the most significant of the CHOGM statements. It says that to be a member of the Commonwealth at all, countries must abide by the Harare Declaration. The Commonwealth Ministerial Action Group was established in 1995 by the Millbrook Commonwealth Action Programme to ensure this.

Fancourt Declaration on Globalization and People-centered Development (1999)

This expresses concern that while globalization can offer benefits for wealth creation and human development, the benefits are not shared equally.

Coolum Declaration: The Commonwealth in the 21st Century—Continuity and Renewal (2002)

This declaration includes a commitment to democracy, the rule of law, good governance, freedom of expression and the protection of human rights, as well as respect for diversity, and work to eliminate poverty.

Aso Rock Commonwealth Declaration on Development and Democracy: Partnership for Peace and Prosperity (2003)

As well as a more general commitment to human rights, this declaration includes a list of specific objectives to be promoted, including machinery to protect human rights and the right to information. The Commonwealth Ministerial Action Group (CMAG) is made up of a rotating group of Foreign Ministers who look into "serious or persistent violations of the principles" contained in the Harare

Commonwealth Declaration. While the Harare Declaration refers to a broader concept of human rights, CMAG has taken a narrow interpretation of its remit, mostly reviewing political values with a focus on the unconstitutional overthrow of a democratically elected government.

CMAG looks into the problem and recommends action, which are usually negotiations with the government. If changes do not occur, the Group can recommend to the Heads of Government that the country should be suspended or expelled from the Commonwealth. Currently, no country is suspended from the councils of the Commonwealth, although Pakistan, which had been suspended until 2004, is still on the agenda of CMAG. Other countries that have previously been suspended include Zimbabwe, before it withdrew from the Commonwealth in 2003, Fiji Islands and Nigeria. These declarations provide the policy direction for the association and its member countries, which, as well as being implemented in-country, also form the basis for work by the Commonwealth Secretariat, the main intergovernmental agency of the Commonwealth.

Parts of the Commonwealth Secretariat that are particularly relevant to human rights include: the Human Rights Unit, the Political Affairs Division, and the Legal and Constitutional Affairs Division. The CHOGM declarations also contain significant promises relating to furthering human rights in-country and exhortations to countries to commit to international treaties. However, there is no peer review mechanism and the biennial meetings do not at present review implementation of human rights commitments. The Foreign Minister of a country, as well as the Head of Government, usually attends CHOGMs.

Commonwealth Foreign Ministers also meet separately once a year. Other parliamentarians are involved in other Commonwealth Ministerial Meetings, which occur on a regular basis. These include: Law, Finance, Women's Affairs, Youth, Education and Health Ministers. Human rights issues are often covered in their deliberations and final statements. While their statements are not in themselves binding on the

Commonwealth, they do provide useful guidelines to Commonwealth states on the topic discussed and are sent to CHOGM for endorsement. Parliamentarians are also involved in the Commonwealth through the Commonwealth Parliamentary Association, which conducts a number of activities aimed primarily at Members of Parliaments, legislatures and parliamentary officials. The Association, with a total membership nearing 15,000 parliamentarians promotes democracy, good governance and human rights. It pays special attention to gender sensitization and women's empowerment, in addition to capacity building for the achievement of the Millennium Development Goals.

The Millennium Development Goals

The Millennium Development Goals commit the international community to an expanded vision of development.

- Eradicate Extreme Hunger and Poverty
- Achieve Universal Primary Education
- Promote Gender Equality and Empower Women
- Reduce Child Mortality
- Improve Maternal Health
- Combat HIV/AIDS, Malaria and other Diseases
- Ensure Environmental Sustainability
- Develop a Global Partnership for Development

REGIONAL STRUCTURES FOR HUMAN RIGHTS

The universal concepts of human rights have been further expanded and expressed in a way that is owned by a specific region. Africa, Europe and the Americas each have a human rights charter for their region, along with associated mechanisms to ensure compliance with the rights to which the states have agreed. Asia and Pacific both have draft regional charters developed by civil society as part of their advocacy designed to trigger a State-sponsored regional mechanism; however this is yet to come to fruition. In this part, therefore, as suggested, briefly explore the human rights structures available specific to the African, European and Inter-American regions.

African Human Rights Mechanisms

The African Union (AU) comes out of a previous regional body, the Organisation of African Unity (OAU), which was established in 1963. The OAU evolved into the AU in 1999, which aims to take a stronger role both on the continent and internationally, focusing on economic integration and social development as a means to political unity. The most important body of the AU is the Assembly, which is made up of the Heads of Government of all member states. A Pan-African Parliament was established in 2004. At this stage it has consultative and advisory powers only, although it is hoped it will develop into an institution with full legislative powers. The human rights mandate and activities of the AU, which are carried out by a variety of bodies, come from the African Charter on Human and People's Rights.

Adopted by the member states of the OAS in 1981 and in force in 1984, African Charter on Human and People's Rights, also known as the Banjul Charter, is the youngest of the regional mechanisms. It is also the most widely accepted of the regional charters, with 53 ratifications or accessions. The African Charter is particularly noteworthy for specifically recognizing and guaranteeing the rights of individuals and groups, the first human rights instrument to do so. In its provisions, it covers a variety of civil, political, economic, cultural and social rights, as well as the right to self-determination, development and the environment.

The role of the African Commission on Human and People's Rights is to promote and protect human and people's rights on the African continent and to interpret the Banjul Charter when required by states or AU institutions. It is made up of eleven independent experts who usually meet twice a year. While it is part of the AU Secretariat, it is not based in Addis Ababa like the rest of the AU, but to prevent political interference, is based in Banjul, the Gambia. In its role to promote human rights, the Commission researches and publishes on the topic, organises seminars and conferences, and supports human rights institutions incountry. It also

develops guidelines related to specific rights issues to be used as a basis for national legislation.

The Commission also has a role in protecting human rights and, towards that aim, the Charter requires States to report on progress, and has set up procedures for complaints from states and individuals. In terms of reporting, countries are required to submit a report on steps taken to implement the Charter every two years. The Commission has a working relationship not only with States but also NGOs and National Human Rights Institutions. NGOs with observer status can prepare 'shadow' reports on the human rights situation in their countries to provide an alternative view. Inter-state complaints —that is, if one State believes another is violating its obligation under the Charter—can be referred to the Commission.

The aim is to secure a friendly settlement. Complaining States are in fact encouraged to approach the other one directly to try to settle the matter without involving the Commission, but the Commission is there to investigate and reach an amicable solution if needed. Complaints of violations are also accepted from individuals. The country concerned is notified of the complaint and an investigation process is put in place. In some cases, if there is a suggestion that it is part of a series of violations, the Commission must draw the Assembly's attention to it and an in-depth study may be undertaken.

The final recommendations of the Commission are not in themselves legally binding on States. However, these are included in the annual reports of the Commission, which are submitted to the Assembly and, if adopted, they become binding. Unfortunately there is no way for the Commission to supervise implementation of its recommendations, and although the Secretariat does send reminder letters to countries, much is left to goodwill. The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights came into force in 2004; however the Court is yet to be established. Once operational it will complement the work of the Commission to ensure protection of the rights in the Charter. However, unlike the Commission, the Court will be able to issue binding

and enforceable decisions. Under the Protocol, cases taken to the Court can relate to any instrument that has been ratified by that State, such as CEDAW or ICCPR or other international treaties, and therefore, in theory, the Court provides an important judicial mechanism to ensure human rights compliance.

Cases will be able to be submitted to the Court by the Commission, States, and African intergovernmental organisations; and the Court will also be able to allow cases by individuals or NGOs with observer status before the Commission. Details of the establishment of the Court are yet to be decided, although there is a possibility that it will be integrated with a Court of Justice of the African Union, to be established to resolve disputes (not necessarily on human rights) between member countries. In 2003, the African Union adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. As well as calling for an end to violence, endorsing affirmative action and including a range of economic and social rights, the Protocol explicitly sets forth the reproductive right of women to medical abortion in certain circumstances and explicitly calls for the legal prohibition of female genital mutilation—two firsts in international law.

States' periodic reports to the Commission on their implementation of the African Charter should also include measures taken towards realising the rights in this Protocol. The African Charter on the Rights and Welfare of the Child was prepared in recognition of the special need to protect the human rights of the child. As well as articulating these rights, it also sets up a committee—the African Committee of Experts on the Rights and Welfare of the Child—to monitor compliance with the Charter and lay down rules and principles on protecting child rights. The Committee accepts complaints of violations of the Charter. States must report to the Committee every three years. The African Peer Review Mechanism (APRM) is an instrument that can be acceded to by members of the African Union and is designed as an African self-monitoring mechanism. On accession, a State prepares a time-

bound Programme of Action for implementing the Declaration on Democracy, Political, Economic and Corporate Governance. Under the APRM, the State also commits itself to be inspected by a team of governance experts to determine whether it conforms to the agreed policies, standards and practices, which include observing the rule of law, and respecting human rights. This process of peer review promotes mutual accountability and compliance with best practice.

Inter-American Human Rights Mechanisms

The Organization of American States (OAS) was established in 1948 by the Charter of the Organization of American States as the main regional body including North, South and Central America. The OAS is responsible for the overall development and oversight of regional human rights standards and mechanisms and it has established bodies for this specific purpose. This human rights system provides recourse to people in the region who have suffered violations by the State and who have been unable to find justice in their own country.

As well as the Charter of the OAS, the mandate for regional human rights work comes primarily from the American Declaration of the Rights and Duties of Man and the more recent American Convention on Human Rights. The American Declaration of the Rights and Duties of Man adopted in 1948 lays out not just the human rights of individuals but also their corresponding duties to participate respectfully in society. While originally adopted as a declaration and not as a legally binding treaty, the American Declaration is now considered a source of international obligations for OAS member states. Over time, however, States decided that this system needed to be strengthened and in 1960 agreed to prepare an American Convention on Human Rights, and an Inter-American Commission on Human Rights. While the Inter-American Commission on Human Rights was established in 1960, the current statute under which it works was adopted in 1979.

The Commission is based in Washington DC, USA and investigates themes of human rights concern as well as individuals' complaints of violations, which can involve visits to the country concerned. In investigations, the Commission uses the American Convention if the State has ratified it, and otherwise uses the American Declaration. It also promotes human rights in the region, and makes recommendations to member countries. The Commission also submits cases to the Inter-American Court on Human Rights.

The American Convention on Human Rights was adopted in 1969 and entered into force in 1978. It strengthens the regional human rights system by making the Commission more effective, creating a Court, and changing the legal nature of the instruments upon which the system is based. While many countries have ratified the Convention, fewer have accepted the Inter-American Court on Human Rights, examining communications from one State about alleged violations by another. There have also been protocols to the Convention, available for ratification.

These are: the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights adopted in 1988, to provide a balance to the Convention's focus on civil and political rights; and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted in 1990. The Inter-American Court on Human Rights is a crucial organ of the regional human rights system as it is an independent judicial institution that applies and interprets the Convention.

It was established in 1969 by the adoption of the Convention (although the statute it works under was adopted in 1979 and more recent rules of procedure were adopted in 2003) and is based in San Jose, Costa Rica. Hearings of the Court are public, along with the decisions, although deliberations remain secret. In its advisory role in interpreting the Convention, the Court is available to all States, although in adjudicating cases, the Court has jurisdiction only when the particular State involved has accepted the Court's binding jurisdiction. Over time, other instruments have been adopted

in the Inter-American region to better protect specific areas of human rights concern.

These are the: Inter-American Convention to Prevent and Punish Torture, which entered into force in 1987; the Inter-American Convention on Forced Disappearance of Persons, which entered into force in 1996; and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, which entered into force in 1995.

EUROPEAN HUMAN RIGHTS MECHANISMS

The European Union (EU) is the main regional body for Europe and is made up of five main institutions: the European Parliament (elected by the people of the member states); the Council of the European Union (representing the governments of the member states); the European Commission (the general Secretariat of the EU); the Court of Justice (which ensures compliance with the law); and the Court of Auditors (which oversees the EU budget). These are supported by other bodies, including those with a specific mandate related to human rights. The European Union also engages in dialogues and sometimes opens criticism regarding the human rights situation in other non-member countries.

The General Affairs and External Relations Council of the European Commission for instance, has expressed deep concern about human rights violations and media restrictions in Zimbabwe. Guidelines exist for its human rights dialogues with third countries, such as that which has recently started taking place with India. In 2004 for instance, the EU highlighted their intention to engage India on the International Criminal Court, abolition of the death penalty, the Convention against Torture, gender discrimination, child labour, labour rights, Corporate Social Responsibility and religious freedom. The most important human rights document in the region is the Convention for the Protection of Human Rights and Fundamental Freedoms, which was developed by the Council of Europe, entered into force in 1953 and has 45 ratifications. The Convention focused on civil and political rights, but the more recent European Social Charter, which focuses on socio-

economic rights, complements it. As well as listing rights, the Convention also sets up a mechanism for ensuring that States fulfill their obligations under the Convention.

The original three bodies (the European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers of the Council of Europe) have since 1998 been simplified and amalgamated into a single European Court of Human Rights. As well as shortening the length of proceedings, this strengthened the judicial character of the system by making it fully compulsory and abolishing the Committee of Ministers' adjudicative role. The European Court of Human Rights has been working under its current format since 1998 and has amassed considerable human rights jurisprudence.

Any State that has ratified the Convention or any individual who believes their rights under the Convention have been violated can lodge a complaint directly with the Court. Final judgments are binding on the country concerned and the Committee of Ministers of the Council of Europe is responsible for supervising whether the State takes adequate measures for the judgment. In 2000, to further strengthen the human rights regime in the region, the European Union adopted the Charter of Fundamental Rights of the European Union.

The Charter–unlike the Convention–is an EU document and the EU itself is bound by the provisions as well as member countries. It also covers some additional areas, not covered in the Convention, although it states that any rights in the Charter that correspond with those in the Convention should have the same meaning and scope, to avoid discrepancies between the two documents. Although the Charter relates just to members of the European Union rather than to any State within the broader geographic region that has ratified it, it is still an important document–particularly as it, for the first time in the European Union's history, sets out in one text the whole range of civil, political, economic and social rights of European citizens and all people resident in the EU. It covers six areas: dignity, freedoms, equality, solidarity, citizens' rights, and justice.

Chapter 4

Parliamentarians as Human Rights Protectors

INTRODUCTION

Entrenchment of a human rights culture in a country requires parliamentarians to actively push for human rights. This part explains how parliamentarians can support the embedding of international standards at all levels of governance since they are both policy and law/makers, as well as mobilizes of public support for greater allegiance to a human rights agenda. The part explores the multiple roles of parliamentarians as members of the executive, members of the opposition, and as members of political parties.

It emphasizes the point that parliamentarians are trustees of people's aspirations and as such, they must ensure that law and policy support human rights. It also shows strategies that some parliamentarians have used to focus greater attention on human rights issues, like having a human rights supportive foreign policy and the appointment of human rights advocates to key positions.

PARLIAMENTARIANS AS HUMAN RIGHTS PROTECTORS

The challenge before parliamentarians is to change the rhetoric of human rights theory into practical realities that benefit populations at home. While States have endorsed countless commitments at the international level, many support human rights only in theory—the ground reality shows a

distressing failure by many governments to convert the rhetoric into practical pro-human rights outcomes for their constituencies back home. Embedding a human rights culture greatly depends on the willingness of law/makers to weave the human rights agenda into all they do. Through its central function as a lawmaking body, parliament can naturally reaffirm the human rights values and principles for which it stands by incorporating these values into all the laws it passes. While parliamentarians are sometimes constrained by party dictates and real politik, the essential importance of human rights makes it imperative that each member of the house sees his or her role first as protectors and promoters of human rights and second as members of parties.

Even in constrained environments devices like the Private Members Bill offer an opportunity to act on individual principle. Even if the Bill is defeated, the associated debates draw attention to otherwise difficult and controversial issues. A parliamentarian's role as a representative of their constituency involves representing the concerns of that community—including human rights concerns–within the parliament and lobbying on behalf of those who fear violations. Making time in busy schedules for those in the community who engage in rights work is another way of showing commitment to this area. As a leader in the community, parliamentarians can also use their speaking engagements to inform and educate the community at large about human rights.

Entrenchment of a human rights culture in a country requires due focus on human rights education not just in academic institutions, but also amongst those who are charged with the responsibility of upholding and enforcing human rights such as police officers, civil servants, judges and prison officials. In this, governments can enroll the assistance of expert civil society practitioners and academics to help design and deliver human rights modules to select groups, for instance corporate managers, and to people at large. The importance of human rights education was recognized at the World Conference on Human Rights in the Vienna Declaration which

states that human rights education, training and public information are essential for the promotion and achievement of stable and harmonious relations among communities and for fostering mutual understanding, tolerance and peace. In fact the decade from 1st January 1995 to 31st December 2004 was declared as the Decade for Human Rights Education. As a follow up to the Decade, the United Nations is in the process of initiating a World Programme for Human Rights Education. During the period from 2005- 2007, the focus will be on human rights in primary and secondary education. MPs, as members of Cabinet, as Ministers, backbenchers or even as members of the Opposition, wear multiple hats, and, as such, have multiple opportunities to push forward the human rights agenda.

SPECIAL ROLE OF THE EXECUTIVE/CABINET

In the parliamentary democracies, Cabinets play a critical role. Cabinets comprise the most influential ministers who collectively take the lead on the issues that shape the destiny of the nation. As such, Cabinets act like an Executive. Alternatively, in some Commonwealth countries, the President and his/her advisors act in this executive capacity. Regardless of the form the Executive takes, it has a special, crucial human rights role to play.

The "executive" in the majority of Commonwealth countries is specifically empowered to negotiate and enter into treaties. Considering that the development of human rights law over the last 50 years has been heavily influenced by international treaty developments, Cabinet members have a significant role to play on the international stage. For example, by guiding their bureaucracies in the contributions they make in the process of making international human rights principles and laws. More information on national roles and responsibilities in relation to treaties is explored in the next Unit. As the body that sets national priorities and policy directions in most Commonwealth countries, as well as largely dictates the legislative programme, the role of the Cabinet as a human rights guardian is crucial. When Cabinet keeps the human rights frame to the fore, it can ensure that all Bills

promote human rights and do not infringe upon committed human rights standards, both when they first give instructions to the bureaucracy to prepare Bills and when they vet these Bills themselves. Therefore, it is important to have a process that scrutinizes all legislation to ensure compliance with national human rights laws and international commitments.

For instance, in Canada when the Charter of Rights and Freedoms was introduced, a process was put in place to ensure that all laws adhere to the principles of the Charter—no minister could bring forward legislation without filing a certificate that the legislation complied with the Charter of Rights and Freedoms. Such a consideration on the rights implications of proposed legislation or executive action can in fact be specifically required when this is included in the Cabinet or other instructions to Cabinet members. Guidelines for legislative drafts can also consciously include a minimum requirement that all Bills are consonant with the country's international human rights obligations. Where there is a Constitutional Bill of Rights in-country, laws will nearly always be required to conform to these standards and, if not, will be in danger of being *ultra vires* (or outside the authority allowed by law). More directly, Cabinet members can also be active in making specific laws and national action plans that further human rights efforts for marginalized groups who need special attention or protection. Affirmative action laws that grant privileges to women and indigenous and tribal populations, for instance, have been passed in many countries.

In New Zealand, for instance preferential access to university courses and scholarships is provided to Maoris. In India, Part XVI of the Constitution includes "Special Provisions Relating to Certain Classes"—affirmative action measures for disadvantaged groups, including seat reservations in the Lok Sabha (House of the People) and in state legislative bodies for members of Scheduled Castes and Scheduled Tribes.

Appointing Human Rights Advocates to Key Positions

The voting and behaviour of government-appointed people

on human rights committees at the UN is always a favourite point of scrutiny by diplomats and human rights advocates who are looking to see who will uphold and who will obstruct a human rights cause. Members of the Commission on Human Rights, for instance, are national representatives. Likewise staff in human rights sections in the UN, Commonwealth and regional organizations is often reliant on the endorsement or recommendation of their governments.

While special reporters, independent experts and members of working groups in the UN human rights system serve in their personal capacity, they are appointed by the Chair of the Human Rights Commission after consultation with member states' representatives. It is crucial that appointments to key positions are based on expertise and a demonstrated commitment to take forward human rights. Too often, however, the unfettered right of sovereign to appoint their nominees to multilateral bodies means that in reality seniority or politics dictate nominations, to the detriment of the credibility of these organizations.

A Human Rights Supportive Foreign Policy

Cabinets can help establish a country's credentials as a conscientious member of the international community by taking up human rights concerns in international forums by:

- Actively drafting and signing on to declarations that call for greater protection of human rights;
- Establishing itself as a champion of human rights by being open and transparent in allowing its human rights track record to be scrutinized by international agencies;
- Using human rights diplomacy to encourage countries with a poor human rights record to adhere to international standards such as through bi-lateral talks;
- Publishing annual reports on the status of human rights in other countries, such as those produced by several countries including the UKs Foreign and Commonwealth office; and
- By providing financial and moral support to human

rights projects, programmes and initiatives in other countries.

THE SPECIAL ROLE OF MINISTERS

In a parliamentary democracy, ministers exercise direct supervision over government departments. The personal inclination of a minister towards a particular cause can shape the attitude of the bureaucracy under him or her, which is responsible at the coal-face for implementing laws and policies. Human rights are therefore better protected when civil servants are made aware that 'their' minister understands human rights standards and is committed to their furtherance and will take a serious view of any breaches.

In their supervisory capacity, ministers can strengthen internal disciplinary mechanisms to deal with failure or negligence to protect human rights. One positive initiative in this area comes from the Australian Capital Territory that requires annual departmental reports to include the ways in which the department has promoted and protected rights during that year. A human rights culture in public sector departments can also be assisted by setting up human rights units, and committees to review complaints of sexual harassment or racial discrimination. Performance reviews at appropriation time are also moments for reviewing the functioning of departments in terms of how well they have progressed in promoting human rights.

Protecting Human Rights: The Need for Rights Friendly Rule-making

Progressive laws are sometimes undermined because the rules that are needed have not been framed—or have been framed in a manner that dilutes the true import. This means that even where parliament is supportive of human rights, if resistant, bureaucrats can still use their rulemaking power to the stifle change.

A salient example of this can be seen in the Indian state of Tamil Nadu, where the Government has designated certain courts specifically as "human rights courts" under the

Protection of Human Rights Act 1993 but no rules have yet been put in place to make these courts effective in practice.

THE SPECIAL ROLE OF THE OPPOSITION

Members of the Opposition are quick to call the government to account for perceived lapses, and can do this specifically for human rights violations.

They often spearhead calls for greater adherence to human rights standards by the police, army and paramilitary forces and frequently pick up on international criticism as a basis for citing the government for bringing the country into disrepute. Just as valuable as opposing government action that is contrary to rights, is taking a bi-partisan approach to positive human rights proposals. The Opposition can help to promote the concept of universal human rights by not opposing important human rights initiatives for political purposes.

As responsible members of parliament, opposition members sitting on various committees—and frequently as their powerful chairs—also have a considerable responsibility for promoting human rights. Apart from the rich opportunities offered to draw attention to shortfall in standards at question time through oral and written questions, members who seriously attend to the findings of international scrutiny bodies, the reports of foreign governments and civil society, as well as to the reports of national human rights institutions and commissions of inquiry can keep the government's performance under constant scrutiny. The parliamentary opposition in Guyana, for instance, highlighted this when a Presidential Commission of Inquiry was appointed to look into alleged government sponsorship of death squads made up of serving and former police officers.

The Opposition issued a press statement demanding that the inquiry be conducted by highly-regarded and respected persons of unblemished integrity who were acceptable to major stakeholders in the country; be accompanied by a credible and secure witness protection programme; allow a role for the Caribbean Community (CARICOM) and other international organizations; have the power to take evidence in camera as

well as in public; and have the authority and resources to take evidence both inside and outside of Guyana. Research on patterns of violence, violation and impunity can impress upon the government the need to review offending policies from a human rights perspective.

Urgent motions can also call attention to serious human rights violations to ensure that human rights concerns are kept in the forefront. Principled refusal to countenance impunity for rights violation, whether in opposition or in government, also furthers human rights compliance at home. Outside parliament, opposition members can also lead fact-finding delegations to examine and report State violations of human rights.

PROMOTING HUMAN RIGHTS WITHIN POLITICAL PARTIES

Most parliamentarians belong to a political party. No matter their persuasion or ideology there are few except those on the extreme fringes that do not abjure violence, avow equality and appreciate the values of social justice and equity.

However, the key lies in how the public gauges its levels of commitment—and actions speak louder than words. While rhetoric makes good press for political parties in public fora, inner party processes show a political grouping's commitment to good governance and human rights. The existence of human rights caucuses and units, women's units, minority and child protection units or even general complaint units within party structures point towards the commitment of a party to human rights principles.

Internalising the human rights agenda is evidenced by diversity in membership and can be seen through the participation of women, tribal, ethnic, linguistic and religious minorities, and traditionally unrepresented groups; as well as their pre-selection to safe seats. Some countries have legislated to ensure that this happens, particularly as it relates to women.

For example, in Guyana, political parties must include a quota of 33% female candidates on their electoral lists. In other countries the decision has been made by parties themselves,

such as Malta where the Labour Party has a 20% quota for women on party lists, and Mozambique where one party has adopted a quota system of 30% for women on election nomination lists and leadership positions. In some instances, individual support of parliamentarians to causes outside a party's set agenda can be constrained by demands for party discipline.

Nonetheless, in their capacity as influential members of their own political parties, parliamentarians can lobby to ensure that commitment to human rights issues figure prominently on their party's electoral manifestos. The initiative for releasing white papers and setting up special commissions to probe human rights abuses has often come from their inclusion in an election manifesto based on public aspirations.

In addition, human rights can be promoted through specific domestic rights issues. For example, domestic issues might include the reform of colonial legislation, particularly police acts, official secrets acts, and press freedom acts; a human rights friendly approach to refugee issues or anti-terror strategies; or the establishment of National Human Rights Institutions.

Recently in Bangladesh for instance, the election manifestoes of both the Bangladesh Nationalist Party and the Awami League included establishing a national human rights commission. A party manifesto can also include big-ticket foreign policy items like signing up to the International Criminal Court or lobbying for reform of the UN Human Rights Commission to ensure that only people with a demonstrated commitment to human rights sit on the Commission.

Chapter 5

International Human Rights Treaties

INTRODUCTION

There is great significance in ratifying international human rights treaties and in taking up certain responsibilities that come with it. This part begins with a call to endorse national commitments to human rights by becoming party to international treaties. It examines the status of treaty ratification, and highlights treaties being ratified in total, without recording reservations that dilute a country's commitment to protect the human rights of its inhabitants. This part also explains the process by which a country submits its reports to treaty monitoring bodies or committees and how national plans of action may be drawn up.

PROMOTING RATIFICATION OF TREATIES

In many cases the attitude of the regime in power and its key members becomes obvious when, though a country has committed to the general principles on an issue, it steadfastly refuses to sign on to the substantive documents that will create obligations back home. Parliamentarians may be reluctant to sign on because it would mean displacing well entrenched power structures or undertaking radical changes at political risk.

As many as 24 countries of the Commonwealth have not yet signed on to the Convention Against Torture, and 51 out of 53 nations haven't agreed to the Optional Protocol which allows visits to places of detention. To ratify means the regime would be subject to regular international reporting about the

progress the country has made in abolishing the possibility of torture. Ratification would also require that specific systems have been put in place to ensure that the possibility of torture by State agencies is minimized. In many cases, this would require completely overhauling old and infirm criminal justice systems or at a minimum, prioritizing police reform. Sometimes this is too hard a political decision to take.

In still other cases, countries ratify international treaties and take the credit of bringing others on board but neglect to put in place laws and procedures that will make the substance of the treaty a living reality at home. Parliament therefore has a significant role to play in ensuring that executive intent to become a party to a treaty is backed by substantive national legislation that gives effect to the treaty. In many parts of the Commonwealth, courts are beginning to take notice of moral obligations under international law. The Supreme Court of Canada recognized the obligations of the State under the Convention on the Rights of the Child (CRC) in the Baker case even though it was argued that there was no enabling legislation to make the international treaty principles binding in domestic law.

Early and wholehearted ratification of human rights treaties establishes a country's credentials as a responsible member of the community of nations and builds public trust in law-makers as it assures voters that their representatives are genuinely committed to people-oriented governance. As well as the legal obligations that come with ratifying a treaty, doing so can also be the spur to put in place effective systems to further human rights compliance. It also sends a strong signal down the line that there is assured political will to effectuate human rights at home.

Unfortunately, the status of ratifications of international human rights treaties is mixed and a number of countries have still not signed up to key ones. Nor is it only ratification that is important but also ensuring that the commitment to human rights is not watered down through reservations. Reservations allow States to avoid certain provisions in a treaty—but this goes against the spirit of international cooperation, which is

premised on the principle of the universality and indivisibility of human rights and does violence to the ability to bring human rights home. In order to gear up for international compliance, parliamentarians can ensure programmes are in place well in advance on signing up to international obligations to prepare the administration for compliance.

This was done in the UK prior to its operationalizing its new human rights law in 2000. It is not, however, just at the time that the final document is open for signing and ratification that parliamentarians can be involved. Parliamentarians can also actively engage in the development process, encouraging national representatives, relevant United Nations representatives and drafters to include the highest standards of human rights protection and promotion.

REPORTING TO TREATY BODIES

Every core treaty has a special human rights committee, Treaty Monitoring Bodies, composed of experts nominated by States, to which each country that has ratified the treaty must report on a regular basis, outlining progress made in implementing treaty obligations. The committee reviews the report and dialogues with the official representative of the State to clarify issues. The committee then prepares its 'Concluding Observations', which contain a list of issues and recommendations for the State to consider in realising the rights guaranteed by the treaty. In reality however, the work of these treaty monitoring bodies is hampered by delays in submitting reports and a hesitancy to share full and complete details about substantive issues.

This, coupled with a tentativeness to implement the recommendations of the treaty monitoring body, is a major impediment to making the rights a reality. In too many countries, reports are prepared solely by bureaucrats with little reference to elected representatives or effective consultation with the public. Parliamentarians must press upon the executive to make the process more participatory and transparent and therefore ensure that the reports contain a variety of views, including those of civil society. Parliaments

can, for instance, hold debates and public hearings, call in ministers and request documents and report from varied departments and citizens. Members of parliament can also be included in the national delegation to the monitoring mechanisms so that they better understand any recommendations that are made.

A notable example of parliamentary oversight of country reports to treaty bodies is the UK's Joint Committee on Human Rights which has a responsibility to make sure all key issues are covered and an honest assessment has been captured in the reports. Several other devices offer themselves in order to ensure more effective compliance with reporting requirements, including simple measures such as an annual list of reports that are due, a timetable for completion and details of how the report will be compiled to ensure inclusion of views from the public and other stakeholders.

Involvement of the National Human Rights Institution, one of the country's best-informed sources on the state of human rights protection and any violations, for instance, enables detailed, up-to-date reporting. In Fiji for instance, the Fiji Human Rights Commission advises the government on its reporting obligation and, without derogating from the primacy of the government's responsibility for preparing those reports, advises on their content. If not satisfied with the report submitted by the state, the Commission prepares a shadow report.

PREPARING PLANS OF ACTION

Incorporating a suggestion by Australia the Vienna Declaration and Programme of Action specifically recommended that "each State consider the desirability of drawing up a national action plan to identify steps whereby that State would improve the promotion and protection of human rights." While relating to a declaration rather than a treaty, this is another example of how documents agreed internationally, can be the impetus for practical change at a national level as well. National Action Plans on Human Rights aim to identify the series of steps necessary to improve a

country's promotion and protection of human rights. Countries all over the world have produced National Action Plans. For example, Malawi, South Africa, Australia, and New Zealand is also finalising its Plan. Developing a national action plan requires a comprehensive look at the current situation, a realistic recognition of priorities and the setting of practical goals for the future. A plan also identifies key challenges and strategies for addressing these priorities. The Office of the High Commissioner on Human Rights has produced a Handbook to guide policy-makers.

Chapter 6

Passing Legislation for Human Rights

INTRODUCTION

As the law-makers of a country, it is parliaments that ensure international human rights standards are met through domestic legislation. Bringing domestic laws in line with the standards required by treaty commitments usually requires parliament to pass legislation that specifically incorporates treaty provisions into domestic law. This part also discusses a constitutional Bill of Rights with key human rights protections, and explains that all laws should accord with international law.

The importance of prioritising key human rights issues such as poverty alleviation and justice sector reform, in budget allocations by providing substantial funds to support the work of national human rights institutions, and guaranteeing a transparent, participatory budget process is also discussed. It concludes by highlighting ways the legislature can support the judiciary to protect human rights, as well as the responsibility of the judiciary to consistently maintain a human rights approach in its decision-making process.

BILL OF RIGHTS: ENSHRINING HUMAN RIGHTS IN THE CONSTITUTION

Subject-specific domestic legislation is one way to protect and promote rights. One of the most effective national efforts is through a constitutional Bill of Rights. The national Constitution is the highest law of a country and overrides all

other laws. Enshrining human rights in the Constitution, therefore, gives them enormous legal weight –all other laws must be in consonance with the standards set out in the Constitution. Most Commonwealth countries have a constitutional Bill of Rights. New Zealand and the UK are examples of countries that have relied upon common law traditions for safeguarding rights but in the modern context have legislated for specific protection of rights.

Most Bills of Rights enshrine core values such as respect for human dignity; equality and non-discrimination; and the opportunity to realise one's potential through the exercise of fundamental freedoms. While many focus on civil and political rights, some notable examples, like the Bill of Rights in the South African Constitution, also include economic and social rights. Constitutions should ideally also enshrine the establishment of an independent human rights institution.

PASSING COMPLEMENTARY LEGISLATION

Ratification of treaties requires that all domestic laws be brought up to the standards of the international commitment and be in harmony with it. In some countries, such as the United States, this is a simple matter because when a treaty is ratified, it is "selfexecuting" so the provisions in the treaty automatically become part of domestic law, such that the public can take the Federal government to court if it has failed to implement the treaty. In Commonwealth countries though, even where a treaty has been ratified, this does not necessarily mean that the commitments in it can be automatically enforced in domestic courts.

This is because while the executive might have the constitutional power to bind the State at international law, only the parliament has the power to change domestic law. As such, parliament must pass legislation to specifically 'incorporate' the treaty provisions into domestic law. One recent example of this was the United Kingdom's enactment of the Human Rights Act 1998, which was specifically enacted to make the rights contained in the European Convention on Human Rights enforceable in UK courts. Likewise, Fiji's Human

Rights Commission Act, 1999 for the purposes of the Fiji Human Rights Commission describes human rights as rights embodied in the United Nations Covenants and Conventions on Human Rights and includes the rights and freedoms set out in the Bill of Rights. Despite the obligation to pass laws that are consonant with treaty obligations many domestic considerations prevent or slow their passing. The conflict between personal laws, customary law and prevailing culture has been cited by some countries in explanation as to why they haven't passed laws that conform to treaty standards, although other countries have managed to do so.

ENSURING ALL OTHER LEGISLATION MEETS HUMAN RIGHTS STANDARDS

In addition to legislation that specifically domesticates international treaties, all laws which parliament passes should be in accordance with international human rights standards. This requirement also applies to the constitutional Bill of Rights, if one exists. Specific human rights oversight committees set up to review legislation ensure it conforms to human rights standards. These committees are bolstered by legislation that specifically requires that all legislation meet minimum human rights standards.

In the State of Queensland, in Australia, for example, the Legislative Standards Act 1992 enshrines fundamental legislative principles that "must be considered when legislation is drafted so that it does not infringe individual liberties." These principles include whether the legislation is consistent with the principles of natural justice and if it has sufficient regard for aboriginal traditions and customs, or provides for protection against selfincrimination. In the United Kingdom, the Human Rights Act 1998 specifically requires that all UK legislation should, if possible, fit with the European Convention on Human Rights.

Because the UK does not permit judicial review of legislation, the courts cannot strike down inconsistent legislation, but if a court finds that a law is incompatible with the Convention, it can make a "declaration of incompatibility"

and parliament must decide what action to take. An example is when Section 23 of the Anti-Terrorism Crime and Security Act 2001, was ruled incompatible with the Human Rights Act 1998 and the European Convention on Human Rights, by the highest court in the country. This part allowed indefinite detention without trial, of foreign nationals suspected of involvement in international terrorism.

The Act makes it clear that parliamentarians have a key role to play in ensuring that all legislation is in line with universal standards. The Act also makes it unlawful for a public authority to violate Convention rights, unless it had no choice due to an Act of Parliament. This explicit extension of the duty to respect human rights on to the bureaucracy is a major step forward in creating a domestic environment genuinely respectful of and committed to human rights.

PROMOTING PRO-HUMAN RIGHTS BUDGETS

Allocations made in budgets show where a country's priorities lie. Optimum budget allocations towards poverty alleviation, human rights education, justice sector reforms, and socio-economic areas reflect the State's commitment to these areas and determine whether human rights can be truly upheld. Budget allocations also indicate the relative importance given to institutions such as human rights commissions, minority commissions, women's commissions, police complaints commissions, human rights courts and ombudsmen—both to be established and to be maintained with sufficient resources to properly discharge their duties.

Despite a strong mandate and excellent networks, human rights institutions are often unable to function to their true potential due to lack of funds. The difference between tokenism and true commitment of a government to human rights can often be seen through the funds available to these institutions. These priorities will be brought to the forefront through genuine consultation and participation of the people. By providing space for such participation and making sure that these views are incorporated into the budget, governments

show their commitment to ensuring that both the process and final document are human-rights friendly. NGOs are increasingly engaging with the process through submissions, as well as analyzing the final budget for adherence to human rights and social justice norms. One example is an initiative in Tanzania that has led to budget guidelines for government departments that now require that budget submissions be prepared with a gender focus.

Since 1996, the Commonwealth Secretariat has also supported gender budget initiatives. In the pilot phase of their project, technical assistance was provided to Barbados, Fiji, St Kitts and Nevis, South Africa and Sri Lanka, for projects with the joint support of the Ministry for Finance and Ministry for Women's Affairs. It must be recognized though that it is not just the community within the country that will influence the budget process, but also international bodies. Donors, for instance, whether through bi-lateral or multi-lateral agreements wield increasing leverage in setting the budgetary agenda in beneficiary countries.

The process of developing Poverty Reduction Strategy Papers (PRSPs), for instance, involves not just national stakeholders, but external development partners as well, particularly the IMF and World Bank. PRSPs aim to bring about a comprehensive national strategy for poverty reduction and describe the macroeconomic, structural and social policies and programmes that a country will pursue over several years, as well as external financing needs and the associated sources of financing. These provide an opportunity for all stakeholders to ensure that poverty reduction is designed and implemented through a human rights framework and that explicit human rights activities are prioritized.

A country's commitment to human rights is also gauged by willingness to contribute to international development agencies that promote human rights, democracy and good governance. Countries quite often make statements committing funds to international agencies but delay in releasing the money. Many crucial bodies such as the Office for the High Commissioner on Human Rights receive some general UN

money but require voluntary contributions to function as designed. Financial contributions included in the budget reflect a State's commitment to international human rights.

SUPPORTING THE JUDICIARY TO PROMOTE AND PROTECT HUMAN RIGHTS

Judiciaries have often been active promoters of human rights by strategically maximizing their position in interpreting legislation and developing common law. As pillars of governance, the legislature and the judiciary share a common goal to promote public welfare through the realization of human rights. Upholding and protecting rights often involves working in tandem, supporting each other and respecting each other's spheres of competence.

As law making bodies, parliaments can create the right conditions to buttress the judiciary's efforts to promote human rights. Examples include voting in adequate budgets that support setting up free legal aid systems for the indigent or setting up special commissions to review the working of laws or courts. The Fiji Law Reform Commission has a mandate to develop law that is just, principled, and accessible, and which reflects the aspirations of the people of the Republic of the Fiji Islands. Open and transparent appointment procedures for judges also offer opportunities to examine the candidates' demonstrable commitment to progressing the cause of human rights. Strategic interpretation and development of common law by the judiciary helps international human rights standards seep into domestic law, and the public psyche. Judicial decisions that call upon the Executive to fulfill its obligations under international law, and decisions which set the standard to view future policy options must be supported wholeheartedly by elected representatives.

The Indian Supreme Court, for instance, scored a considerable victory for human rights in the Nilabati Behera case, when it struck down a reservation by the Indian Government to the International Covenant on Civil and Political Rights to the provision requiring that a victim of unlawful arrest/detention have an enforceable right of

compensation. The court, relying on this international law provision, upheld the right of citizens to monetary compensation for wrongful acts of the State. It is positive that the executive and the legislature have supported this decision.

Chapter 7

Using the Parliamentary Committee System

INTRODUCTION

Parliamentary committees can enhance levels of human rights protection in-country. This part describes how committee systems in various countries have broadened their remit to ensure adherence to international human rights standards and treaty commitments. In showing how a range of parliaments have established committees to promote and protect human rights—several with exclusive human rights mandates. This part lists the different types of committees and the impact they can have. As such, this part is an easy reference for collecting various replicable examples of good practice.

COMMENTARY

Parliamentary committees are the workhorses of parliament. Recognising that it is not practical for parliament as a whole to undertake detailed oversight tasks, much of the close examination and careful work of parliament is done in committees: reviewing legislative proposals, scrutinizing budgets, examining the policies and programmes of departments, and keeping an effective surveillance over government.

Additionally, parliamentary committees are usually empowered to recommend amendments to legislation as appropriate—including improvements to make laws more human rights friendly. Committees with human rights

mandates may be set up as long-term 'standing' committees, as sub-committees of standing committees or on an ad hoc basis, sessionally or for a specific purpose like fact finding or investigation. Standing committees or permanent committees are usually set up from one term of parliament to the next and operate on a continuing basis.

Sub-committees also operate from one parliament term to another and assist the standing committees. Other types of committees have limited duration and cease to exist on the completion of their objectives or on presentation of their final recommendations or report. Committees provide an opportunity for parliamentarians to really engage with a specific subject in detail in an environment conducive to a deeper consideration of the implications of the proposed legislation. They address a diverse range of human rights issues such as the existence of cruel and inhuman punishments in penal laws, lack of adherence to human rights standards in custodial institutions; incidence of human trafficking; child rights issues; outlawing of the death penalty; and domestic violence among other things.

Committees play an important role in ensuring international treaties are entered into, effectively drafted and in legislation for compliance with human rights principles. The composition of the committee itself is important and there are usually rules to ensure that a variety of political perspectives are equitably represented on the committee. In Canada, for instance, certain committees, such as the Standing Committee on Access to Information, Privacy and Ethics, must be chaired by a member of the official Opposition, while one vice chair must be from the ruling party, the other vice chair must be a member of an opposition party other than the official Opposition.

More than diversity of political views, the composition of committees provides an opportunity for parliament to demonstrate its commitment to human rights principles by, where possible, ensuring a membership that is gender-balanced and includes diverse backgrounds. Committees offer a practical means to incorporate the aspirations of the people into

parliamentary processes. At the same time, committees can enable individual parliamentarians to make a contribution to human rights, with less pressure of party politics. Members of the public can usually make submissions and sometimes even presentations to the committee to draw their attention to key human rights issues that may have been overlooked or underestimated. In this context, committees can provide a useful mechanism for taking into account the interests of special groups, like minorities or indigenous peoples. Routinely making final committee reports provides transparency and heightens their impact.

An effective committee is one that will take care to encourage effective public participation, by publicising reviews, holding public hearings, and inviting members of the public to give evidence or to make written submissions. After all, it is not just what law is made, but also how it is made—and this includes participation of the people. Committees are becoming increasingly open—New Zealand's system is an example of this as soon after the first reading of a bill, it is publicised in the media. Committee members travel throughout the country where public hearings are held. Respondents are invited to give evidence, and the public is invited to make written submissions. In Zambia as well, reforms to the Committee system in 1999 have enabled increased public participation. The public and the media can now attend committee sittings and the public can make submissions. This is made more accessible by a parliament's website, which gives information on committee sittings, items to be discussed and guidelines for submissions.

COMMITTEES WHICH SCRUTINIZE TREATIES

There is an increasing tendency by domestic courts to take international obligations into account even if they have not been incorporated into national law via specific legislation. Consequently, in some jurisdictions parliaments have responded by trying to implement procedures to enable parliamentary engagement in the treaty by making process, in recognition of the fact that it is increasingly untenable for

treatymaking to take place in the absence of greater legislative oversight. In Jamaica, for instance, the Internal and External Affairs Committee is charged with examining treaties and other international agreements and advising parliament on their likely impact on the country. The Australian Parliament has established a Treaties Committee, which is mandated to review and report on all treaty actions proposed by the government before action is taken.

All treaty actions proposed by the government are tabled in parliament for a period of at least 15 sitting days (although if a treaty is urgent or sensitive this process can be moderated). When tabled, the proposed treaty is accompanied by a National Interest Analysis (NIA) that explains why the government considers it appropriate to enter into the treaty. The Committee advertises its reviews, inviting comments, and routinely holds public hearings. At the completion of its inquiries, the Committee presents a report to parliament with advice to be taken. In New Zealand, the new Parliamentary Treaty Examination process is incorporated in Standing Orders of Parliament which now require the government to present and refer key treaties to the House of Representatives prior to ratification, together with an NIA.

It also provides for consideration of such treaties by the Foreign Affairs Committee, which is required to report back to the House. It is not just committee members who play a crucial role, but also ordinary MPs who can make recommendations for consideration. They can usefully encourage parliament and the executive to ensure that all human rights treaties are ratified promptly and comprehensively, and that other international agreements are drafted in accordance with universal standards.

GENERAL COMMITTEES WHICH SCRUTINIZE LEGISLATION

Standing Committees dedicated to reviewing legislation before it is passed by parliament include within their mandate the power to examine whether proposed legislation conforms to human rights standards. It is preferable for such scrutiny to

take place as early in the process as possible and not to be overlooked in the desire to quickly pass legislation. With legislation in response to 'emergencies' such as terrorist threats there can be a concerning tendency to rush legislation through and either avoid the committees altogether or give them so little time that they cannot operate effectively. When time is tight, experts with a background in human rights can be very useful to over-burdened politicians.

One example of these committees from Australia is the Scrutiny of Acts and Regulations Committee of the State of Victoria, which is specifically charged with reporting on whether any Bill directly or indirectly trespasses unduly upon rights or freedoms. This Committee has used this mandate to actively promote and enforce international human rights standards. In 1993, the Committee's adverse findings in respect of the Crimes Amendment Bill 1993—based primarily on conflicts with the International Covenant on Civil and Political Rights and Convention on the Rights of the Child—led to the withdrawal and redrafting of the legislation.

The mandate of Canada's Standing Joint Committee for the Scrutiny of Regulations (established under the Rules of the Senate and the Standing Orders of the House of Commons) specifically includes examining whether all government regulations' conform with the Canadian Charter of Rights and Freedoms.

This is particularly significant because it recognises that Committees:

- Should have a role in reviewing subordinate legislation
- Such reviews should be alert to ensuring that regulations do not undermine pro-human rights provisions in primary legislation

The value of such a committee can be seen in a report tabled by the Committee in November 1991 which proposed the disallowance of provisions of the Indian Health Regulations as the Committee argued this infringed on constitutionally protected rights and freedoms. The House of Commons agreed without debate, and the government complied by revoking the

provisions. Parliamentarians are encouraged to ensure that the mandates of existing parliamentary review committees include a specific requirement to examine whether Bills and Regulations conform to human rights standards. MPs who sit as members of review committees can, in any case, encourage their committee to recognize an implied duty to ensure all proposed laws comply with human rights standards. This should be a relatively straightforward matter for committees operating in jurisdictions with a constitutional Bill of Rights. As the constitution is the supreme law of the land, parliamentarians have a clear duty to make sure that any laws that parliament enacts are in accordance with the constitution.

SPECIFIC HUMAN RIGHTS COMMITTEES

A number of parliaments in the Commonwealth have created specific committees to deal with human rights issues. The creation of a dedicated parliamentary human rights committee, or at the very least, the expansion of the mandate of an existing committee, with a standing remit to review all legislation for compliance with universal human rights standards is a key means of institutionalizing the role of parliamentarians as human rights protectors. These can be enhanced by preparing clear instructions on their remit, as vague terms of reference can undermine the workings of committees.

Such committees reduce the likelihood of legislation inadvertently breaching standards and can work to ensure that the government discharges all of its obligations to international treaty monitoring bodies. The UK Joint Committee on Human Rights performs this role, scrutinising all bills with a human rights lens and overseeing the government's treaty obligations. It has also used its power to prepare reports on key issues such as how the gaps in the enforcement of economic, social and cultural rights can be filled by domestic protective legislation and the value of a rights based approach to poverty. By putting all its meetings and documents on the web it expands knowledge of human rights and demonstrates its own commitment to openness. Mindful of the fact that the

Canadian Senate is responsible for national interest, regional interest and minority interest, the Canadian Senate Standing Committee on Human Rights has a general mandate to study human rights issues.

Though the committee at present does not look at specific violations, it may do so in future if the members so wish. Its report titled: Promises to Keep: Implementing Canada's Human Rights obligations, which was tabled on December 31, 2001, documented Canada's achievements but also the shortcomings of Canada's practices, procedures, and legislation in the field of international human rights. Particularly noted, was the lack of enabling legislation for international treaties and the lack of parliamentary input.

Also noted was the fact that while Canada is a member of the Organization of American States, it has yet to ratify the OAS Convention on Human Rights. Canada also has a Standing Committee on Justice and Human Rights in the House of Commons, which in 2003, recommended an amendment to the Criminal Code providing for the punishment of incitement to hatred, which was then passed by the House of Commons. Dedicated human rights committees can also oversee government activities to ensure that departments are implementing their programmes in a rights-friendly manner. This includes Sierra Leone's Parliamentary Oversight Committee on Human Rights; as well as the Zambia Committee on Legal Affairs, Governance, Human Rights and Gender, which is mandated to oversee the activities of key ministries, the Permanent Human Rights Commission and other government departments and agencies directly related to the operations of the Committee.

The Committee carries out detailed scrutiny of their activities and makes appropriate recommendations. It also recommends review of government policy or existing legislation and may consider draft bills when referred by the House. Of note is that the Committee will follow up on its recommendations. In 2002, for instance, it toured prisons and gave recommendations. Then in 2003 it assessed the response to these. In line with the recommendations, sanitation

improvements had begun, and disciplinary action had been taken against a corrupt court marshal. Cameroon also has a committee on constitutional affairs, human rights and liberties, justice, legislation and administration. Establishing a dedicated human rights committee sends a strong message to the public that parliament is serious about this critical issue and can focus public and parliamentary attention on human rights issues, in addition to providing a key mechanism for facilitating civil society engagement.

However, sometimes the work of parliamentary committees can be severely restricted if they are not vested with the powers to enforce attendance of witnesses, especially if they are aligned with the government. In South Africa, the significance of committees as vehicles of democratic governance has been duly recognized as committees are empowered to summon any person to give evidence under oath or produce a document, receive petitions or submissions from any interested parties, conduct public hearings, decide their own procedures, and meet on any day or at any time whether the House is in session or not. In addition, it is important that committees are vested with powers to carry out on-site visits to detention centres or correctional institutions to gauge the true extent of the government's compliance with human rights standards.

Parliamentary committees can prove useful in building specific human rights knowledge among legislators, in addition to providing a mechanism for parliamentary oversight of national human rights institutions or other oversight bodies. Namibia's Parliament has a standing committee not only to oversee the working of the Ombudsman—which acts as a watchdog for the protection of the rights of the individual against abuses by the administration—but also to gauge the response of government offices, ministries and agencies to the Ombudsman's office.

In addition to considering the annual and other reports of the Ombudsman that are laid before the National Assembly, the Committee also examines the policies and methodologies that are followed during investigation of complaints and can

even recommend to the Assembly whether specific cases need to be referred back to the Ombudsman for reinvestigation. Such committees function most effectively if they work in close co-operation with other parliamentary committees, such as those dealing with constitutional affairs, justice, foreign or social affairs. Such collaborations mainstream human rights into parliament's work, and ensure that human rights issues receive the concentrated attention they merit.

Follow-up to the reports of committees is important. Usually the government is obliged to respond to the recommendations of a committee—which may be to alter or disallow a bill because it does not conform to human rights standards; provide for certain safeguards to protect those lodged in custodial institutions; or be as generic as promoting human rights education. In Canada, for example, a response is required from the government within 150 days under the Standing Orders of the House of Representatives. In the UK, departments must reply within 60 days, unless a longer period has been agreed by the committee. The government's response also requires follow-up, which can involve parliamentary debate or the committee can ask the minister concerned to give further evidence.

Chapter 8

Establishing National Human Rights Bodies

INTRODUCTION

This part examines the significance of National Human Rights Bodies in protecting and promoting human rights. Through diverse examples it shows the various bodies that can be set up by parliament or government to safeguard individual and group rights.

It explains National Human Rights Institutions and the internationally recognized set of principles used as the basis for their establishment. It also talks about other special commissions including commissions of inquiry that may be set up to address specific human rights violations.

COMMENTARY

Parliament has the power to create agencies outside of parliament that are tasked with promoting and protecting human rights. These include National Human Rights Institutions, Ombudsmen and specific sectoral commissions and law commissions that constantly review and recommend legislative changes. Regrettably, once established many are under-resourced financially and in terms of staff.

Often reports and recommendations are not tabled or disregarded and the independence from political power curbed. Nevertheless ensuring strong, autonomous, well-resourced bodies with 'teeth', mandated to promote and protect human rights and monitor compliance is another means by which

parliamentarians can bring human rights home and ensure a culture of human rights becomes embedded in governance and society.

NATIONAL HUMAN RIGHTS INSTITUTIONS

Commonwealth Jurisdictions have established National Human Rights Institutions (NHRI). These vary in name, role, structure and effectiveness, but what they have in common is their power as a statutory body, mandated to not only promote human rights, but also to investigate alleged violations of human rights. An effective NHRI is the chief body a state can provide to its citizens for seeking recourse, should their rights be violated. A basic set of internationally recognize standards, known as the Paris Principles, provides the bare minimum for the establishment and operation of NHRIs.

The key criteria of the Paris Principles are that the NHRI:

- Is independent, and that this is guaranteed by statute or constitution;
- Is autonomous from government;
- Is plural and diverse, including in membership;
- Has a broad mandate which is based on universal human rights standards;
- Has adequate powers of investigation; and
- Has sufficient resources to carry out their functions.

The Commonwealth has also developed a set of Best Practice Principles; and the Abuja Guidelines on the Relationship Between Parliaments, Parliamentarians and Commonwealth National Human Rights Institutions outlines the important relationship between these bodies and suggestions for further developing this relationship in a Commonwealth context.

Some constitutions specifically provide for the creation of the NHRI, for instance, South Africa. Elsewhere, parliament has the power to create an NHRI through legislation. NHRI mandates go beyond examining individual cases to looking at conditions that create human rights violations, to research and training, and importantly to public education on human rights. NHRIs can usually only make recommendations on cases,

rather than enforce its own orders or force the government into action this means that parliament has a particular responsibility to closely monitor the NHRI's reports to parliament and take action to prevent further such abuses. Importantly, broad mandates allow NHRIs to examine not just narrow areas such as equality and discrimination but the whole gamut of rights.

However, sometimes specific situations or themes require special attention. Australia, for instance, appointed an Aboriginal and Torres Strait Islander Social Justice Commissioner in response to the findings of the Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into Racist Violence, and in response to the social and economic disadvantage faced by Indigenous Australians. The Commissioner who is a member of Australia's NHRI, the Human Rights and Equal Opportunity Commission, puts indigenous issues before the Federal Government and the Australian community to promote understanding and respect for the rights of Indigenous Australians.

Parliamentary responsibility includes ensuring that the NHRIs' reports are received promptly, debated and discussed at length and that recommendations are acted upon including enacting policies and laws to ensure their implementation. In some countries, this is done through a specific committee. In Sri Lanka a Select Committee on Human Rights reviews the functioning of the Human Rights Commission.

SUBJECT SPECIFIC COMMISSIONS

The work of National Human Rights Institutions can be supported by additional subject specific commissions that give prominence to a particularly important human rights issue. They are also a practical way of drawing in quality expertise, and ensuing that sufficient funds are dedicated to dealing with human rights issues that may be particularly challenged in the national context. Examples of these in the Commonwealth include Pakistan's National Commission on the Status of Women with the mandate to review all laws, rules and regulations affecting the rights of women and make

recommendations towards ending discrimination and achieving gender equality. The South African Commission on Gender Equality is a constitutional body that monitors all sectors of society to ensure that they are promoting gender equality. The Commission carries out research into all existing legislation from a gender perspective and also scrutinizes all impending laws with the same purpose.

The mandate of the United Kingdom's Commission for Racial Equality extends beyond examining government human rights violations and includes the activities of private sector bodies too. The Commission gives advice to people who think they have suffered discrimination or harassment and promotes policies and practices to help ensure equal treatment for all in both private businesses and public organizations. In 2004 the CRE started a formal investigation into the police service of England and Wales, and in its interim report noted that more than 90% of race equality schemes it had investigated failed to meet minimum standards by law. While the final report is still pending, it has begun enforcement action against fourteen police forces and eight police authorities—if they fail to produce a lawful scheme within 90 days, they could face an enforcement order from the High Court.

THE OMBUDSMAN

Historically, the Offices of the Ombudsman have dealt mainly with individual cases of maladministration. In recent years however, as human rights have increasingly been recognized as being central to effective democracy and good governance, the mandates have broadened to encompass the government's performance in protecting human rights. This is particularly significant because the Ombudsman is an independent and impartial body, and usually has powers to make recommendations directly to parliament and/or to mediate disputes.

A recognition of the importance of following up on these recommendations is seen in Namibia where the 1990 Ombudsman Act of 1990 set up a Standing Committee on the Reports of the Ombudsman to consider the reports. Even where

a human rights mandate is not explicitly mentioned in many of the Ombudsman Acts, human rights issues are often dealt, for example, when complaints are made against the police and/ or prison authorities. Ombudsmen are also increasingly assuming responsibilities in the area of promoting human rights, through educational activities and information programmes.

In Lesotho, one of the objectives of the office of the Ombudsmen is to develop and implement "a client driven public awareness programme on fundamental human rights". In some countries in Eastern Europe specific Human Rights Ombudsman has been established. While not specific to human rights, many countries have established Ombudsmen—some with a specific sectoral mandate, while others have more general oversight powers. In Fiji, the link between the Ombudsman and human rights protection is very clear—the Ombudsman is also the constitutionally mandated Chairperson of the Fiji Human Rights Commission. Ghana's Commission on Human Rights and Administration of Justice is actually a combination of a national human rights institution and an ombudsman.

It not only looks at violations of human rights by serving public officers but also examines complaints about unequal access to recruitment or services by state agencies, corruption and misappropriation of public money by officials, in addition to looking at practices and actions by private persons and enterprises that violate constitutional rights and freedoms. In Papua New Guinea, the Ombudsman Commission has recently set up a specific Human Rights part to manage the increasing number of human rights cases the Office has been receiving. In Malawi, the Ombudsman is mandated to investigate and take legal action against government officials responsible for human rights violations and other abuses.

In South Africa, the National Public Protector, as the office of the Ombudsman is called, can among other things investigate 'improper prejudice suffered' as a result of 'violations of human rights'. Notably, Ombudsmen are particularly significant as human rights protectors in small

states, where financial and human resources may militate against setting up both an NHRI and an Ombudsman. Where Ombudsmen's offices already exist, urgent consideration should be given to specifically including human rights in their mandate, along with additional financial resources to enable the Ombudsman to properly fulfil this. Ombudsman's recommendations on human rights issues can be seriously considered by parliament and regarded as a priority.

AD HOC COMMISSIONS OF INQUIRY

Ad hoc committees and commissions are sometimes set up outside parliament to examine issues of current or on-going concern. They may sit in closed or open session and examine an issue in minutiae, call for evidence from government bodies *and civil society and take expert and lay opinion. Ad hoc* commissions can examine particular cases or patterns of human rights violations, such as ethnic and race riots, regime violence or systematic government failure to protect the rights of citizens.

For instance, the Ugandan Government established a Commission of Enquiry in 1986 to investigate the human rights abuses committed by past governments from independence till the date it seized power. This culminated final report, including recommendations to incorporate human rights education in schools, universities, and army training. In the Maldives in 2003, a Presidential Commission was appointed to look into the death of Hassan Evan Naseem, which sparked off prison riots that later spilled into the streets.

Chapter 9

Theoretical Distinctions

NATURAL AND LEGAL RIGHTS

Natural and legal rights are two types of rights theoretically distinct just as to philosophers and political scientists. Natural rights, also called inalienable rights, are considered to be self-evident and universal. They are not contingent upon the laws, customs, or beliefs of any particular culture or government. Legal rights, also called statutory rights, are bestowed by a particular government to the governed people and are relative to specific cultures and governments. They are enumerated or codified into legal statutes by a legislative body.

The theory of natural law is closely related to the theory of natural rights. During the Age of Enlightenment, natural law theory challenged the divine right of kings, and became an alternative justification for the establishment of a social contract, positive law, and government—and thus legal rights—in the form of classical republicanism. Conversely, the concept of natural rights is used by some anarchists to challenge the legitimacy of all such establishments.

The idea of human rights is also closely related to that of natural rights; some recognize no difference between the two and regard both as labels for the same thing, while others choose to keep the terms separate to eliminate association with some features traditionally associated with natural rights. Natural rights, in particular, are considered beyond the authority of any government or international body to dismiss. The Universal Declaration of Human Rights is an important legal instrument enshrining one conception of natural rights

into international soft law. the legal philosophy known as Declarationism seeks to incorporate the natural rights philosophy of the United States Declaration of Independence into the body of American case law on a level with the United States Constitution.

The idea that animals have natural rights is one that has gained the interest of philosophers and legal scholars in the 20th century, and as such, even on a natural rights conception of human rights, the two terms may not be synonymous. While the existence of legal rights has always been uncontroversial, the idea that certain rights are natural or inalienable also has a long history dating back at least to the Stoics of late Antiquity and Catholic law of the early Middle Ages, and descending through the Protestant Reformation and the Age of Enlightenment to today.

The Stoics held that no one was a slave by their nature; slavery was an external condition juxtaposed to the internal freedom of the soul.

Seneca the Younger wrote:

> It is a mistake to imagine that slavery pervades a man's whole being; the better part of him is exempt from it: the body indeed is subjected and in the power of a master, but the mind is independent, and indeed is so free and wild, that it cannot be restrained even by this prison of the body, wherein it is confined.

Of fundamental importance to the development of the idea of natural rights was the emergence of the idea of natural human equality. As the historian A.J. Carlyle notes: "There is no change in political theory so startling in its completeness as the change from the theory of Aristotle to the later philosophical view represented by Cicero and Seneca.... We think that this cannot be better exemplified than with regard to the theory of the equality of human nature."

Charles H. McIlwain likewise observes that "the idea of the equality of men is the profoundest contribution of the Stoics to political thought" and that "its greatest influence is in the changed conception of law that in part resulted from it." Cicero argues in De Legibus that "we are born for Justice,

and that right is based, not upon's opinions, but upon Nature." Centuries later, the Stoic doctrine that the "inner part cannot be delivered into bondage" re-emerged in the Reformation doctrine of liberty of conscience.

Martin Luther wrote:

> Furthermore, every man is responsible for his own faith, and he must see it for himself that he believes rightly. As little as another can go to hell or heaven for me, so little can he believe or disbelieve for me; and as little as he can open or shut heaven or hell for me, so little can he drive me to faith or unbelief. Since, then, belief or unbelief is a matter of every one's conscience, and since this is no lessening of the secular power, the latter should be content and attend to its own affairs and permit men to believe one thing or another, as they are able and willing, and constrain no one by force.

17th-century English, philosopher John Locke discussed natural rights in his work, identifying them as being "life, liberty, and estate", and argued that such fundamental rights could not be surrendered in the social contract. Preservation of the natural rights to life, liberty, and property was claimed as justification for the rebellion of the American colonies. As George Mason stated in his draft for the Virginia Declaration of Rights, "all men are born equally free," and hold "certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity."

Another 17th-century Englishman, John Lilburne who came into conflict with both the monarchy of King Charles I and the military dictatorship of Oliver Cromwell governed republic, argued for level human basic rights he called "freeborn rights" which he defined as being rights that every human being is born with, as opposed to rights bestowed by government or by human law. The distinction between alienable and unalienable rights was introduced by Francis Hutcheson. In his Inquiry into the Original of Our Ideas of Beauty and Virtue, Hutcheson foreshadowed the Declaration of Independence, stating: "For wherever any Invasion is made upon unalienable

Rights, there must arise either a perfect, or external Right to Resistance. Unalienable Rights are essential Limitations in all Governments." However, Hutcheson placed clear limits on his notion of unalienable rights, declaring that "there can be no Right, or Limitation of Right, inconsistent with, or opposite to the greatest publick Good." Hutcheson elaborated on this idea of unalienable rights in his *A System of Moral Philosophy*, based on the Reformation principle of the liberty of conscience.

One could not in fact give up the capacity for private judgment regardless of any external contracts or oaths to religious or secular authorities so that right is "unalienable". As Hutcheson wrote, "Thus no man can really change his sentiments, judgments, and inward affections, at the pleasure of another; nor can it tend to any good to make him profess what is contrary to his heart. The right of private judgment is therefore unalienable."

In the German Enlightenment, Hegel gave a highly developed treatment of this inalienability argument. Like Hutcheson, Hegel based the theory of inalienable rights on the de facto inalienability of those aspects of personhood that distinguish persons from things. A thing, like a piece of property, can in fact be transferred from one person to another.

But the same would not apply to those aspects that make one a person, wrote Hegel:

> The right to what is in essence inalienable is imprescriptible, since the act whereby I take possession of my personality, of my substantive essence, and make myself a responsible being, capable of possessing rights and with a moral and religious life, takes away from these characteristics of mine just that externality which alone made them capable of passing into the possession of someone else. When I have thus annulled their externality, I cannot lose them through lapse of time or from any other reason drawn from my prior consent or willingness to alienate them.

Thus in discussion of social contract theory, "inalienable rights" were said to be those rights that could not be

surrendered by citizens to the sovereign. Such rights were thought to be natural rights, independent of positive law. However, many social contract theorists reasoned that in the natural state only the strongest could benefit from their rights. Thus people form an implicit social contract, ceding their natural rights to the authority to protect them from abuse, and living henceforth under the legal rights of that authority. But many historical apologies for slavery and illiberal government were based on explicit or implicit voluntary contracts to alienate any "natural rights" to freedom and self-determination.

The de facto inalienability arguments of the Hutcheson and his predecessors provided the basis for the anti-slavery movement to argue not simply against involuntary slavery but against any explicit or implied contractual forms of slavery. Any contract that tried to legally alienate such a right would be inherently invalid. Similarly, the argument was used by the democratic movement to argue against any explicit or implied social contracts of subjection by which a people would supposedly alienate their right of self-government to a sovereign as, for example, in Leviathan by Thomas Hobbes. Ernst Cassirer,

> There is, at least, one right that cannot be ceded or abandoned: the right to personality...They charged the great logician [Hobbes] with a contradiction in terms. If a man could give up his personality he would cease being a moral being. ... There is no pactum subjectionis, no act of submission by which man can give up the state of free agent and enslave himself. For by such an act of renunciation he would give up that very character which constitutes his nature and essence: he would lose his humanity.

These themes converged in the debate about American Independence. While Jefferson was writing the Declaration of Independence, Richard Price in England sided with the Americans' claim "that Great Britain is attempting to rob them of that liberty to which every member of society and all civil communities have a natural and unalienable title." Price again

based the argument on the de facto inalienability of "that principle of spontaneity or self-determination which constitutes us agents or which gives us a command over our actions, rendering them properly ours, and not effects of the operation of any foreign cause. Any social contract or compact allegedly alienating these rights would be non-binding and void, wrote Price:

> Neither can any state acquire such an authority over other states in virtue of any compacts or cessions. This is a case in which compacts are not binding. Civil liberty is, in this respect, on the same footing with religious liberty. As no people can lawfully surrender their religious liberty by giving up their right of judging for themselves in religion, or by allowing any human beings to prescribe to them what faith they shall embrace, or what mode of worship they shall practise, so neither can any civil societies lawfully surrender their civil liberty by giving up to any extraneous jurisdiction their power of legislating for themselves and disposing their property.

Price raised a furor of opposition so in 1777 he wrote another tract that clarified his position and again restated the de facto basis for the argument that the "liberty of men as agents is that power of self-determination which all agents, as such, possess." In Intellectual Origins of American Radicalism, Staughton Lynd pulled together these themes and related them to the slavery debate:

> Then it turned out to make considerable difference whether one said slavery was wrong because every man has a natural right to the possession of his own body, or because every man has a natural right freely to determine his own destiny. The first kind of right was alienable: thus Locke neatly derived slavery from capture in war, whereby a man forfeited his labour to the conqueror who might lawfully have killed him; and thus Dred Scott was judged permanently to have given up his freedom. But the second kind of right, what Price called "that power of self-determination which

> all agents, as such, possess," was inalienable as long man remained man. Like the mind's quest for religious truth from which it was derived, self-determination was not a claim to ownership which might be both acquired and surrendered, but an inextricable aspect of the activity of being human.

Meanwhile in America, Thomas Jefferson "took his division of rights into alienable and unalienable from Hutcheson, who made the distinction popular and important", and in the 1776 United States Declaration of Independence, famously condensed this to:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights..."

In the nineteenth century, the movement to abolish slavery seized this passage as a statement of constitutional principle, although the U.S. constitution recognized and protected slavery. As a lawyer, future Chief Justice Salmon P. Chase argued before the Supreme Court in the case of John Van Zandt, who had been charged with violating the Fugitive Slave Act, that:

> "The law of the Creator, which invests every human being with an inalienable title to freedom, cannot be repealed by any interior law which asserts that man is property."

Many documents now echo the phrase used in the United States Declaration of Independence. The preamble to the 1948 Universal Declaration of Human Rights asserts that rights are inalienable: "Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Article 1, §1 of the California Constitution recognizes inalienable rights, and articulated some of those rights as "defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." However, there is still much dispute over which "rights" are truly natural rights and which are not, and the concept of natural or inalienable rights is still controversial to

some. Contemporary political philosophies continuing the liberal tradition of natural rights include libertarianism, anarcho-capitalism and Objectivism, and include amongst their canon the works of authors such as Robert Nozick, Ludwig von Mises, Ayn Rand, and Murray Rothbard.

A libertarian view of inalienable rights is laid out in Morris and Linda Tannehill's The Market for Liberty, which claims that a man has a right to ownership over his life and therefore also his property, because he has invested time in it and thereby made it an extension of his life. However, if he initiates force against and to the detriment of another man, he alienates himself from the right to that part of his life which is required to pay his debt: "Rights are not inalienable, but only the possessor of a right can alienate himself from that right—no one else can take a man's rights from him."

Legal Rights Documents

The specific enumeration of legal rights accorded to people has historically differed greatly from one century to the next, and from one regime to the next, but nowadays is normally addressed by the constitutions of the respective nations. The following documents have each played important historical roles in establishing legal rights norms around the world. The Magna Carta required the King of England to renounce certain rights and respect certain legal procedures, and to accept that the will of the king could be bound by law. The Declaration of Arbroath established the right of the people to choose a head of state.

The Bill of Rights declared that Englishmen, as embodied by Parliament, possess certain civil and political rights. The Claim of Right was one of the key documents of Scottish constitutional law. United States Declaration of Independence succinctly defined the rights of man as including, but not limited to, “Life, liberty, and the pursuit of happiness” which later influenced “liberté, égalité, fraternité” in France. Article 13 of the 1947 Constitution of Japan, and in President Ho Chi Minh’s 1945 declaration of independence of the Democratic Republic of Vietnam. An alternative phrase “life, liberty and

property", is found in the Declaration of Colonial Rights, a resolution of the First Continental Congress. Also, Article 3 of the Universal Declaration of Human Rights reads, "Everyone has the right to life, liberty and security of person."

Virginia Statute for Religious Freedom Written by Thomas Jefferson in 1779, the document asserted the right of man to form a personal relationship with God without interference by the state. The Declaration of the Rights of Man and of the Citizen was one of the fundamental documents of the French Revolution, defining a set of individual rights and collective rights of the people. The United States Bill of Rights, the first ten amendments of the United States Constitution, was another influential document.

The Universal Declaration of Human Rights is an over-arching set of standards by which governments, organisations and individuals would measure their behaviour towards each other. The preamble declares that the "...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world..." The European Convention on Human Rights was adopted under the auspices of the Council of Europe to protect human rights and fundamental freedoms. The International Covenant on Civil and Political Rights is a follow-up to the Universal Declaration of Human Rights, concerning civil and political rights. The International Covenant on Economic, Social and Cultural Rights is another follow-up to the Universal Declaration of Human Rights, concerning economic, social and cultural rights. The Canadian Charter of Rights and Freedoms was created to protect the rights of Canadian citizens from actions and policies of all levels of government. The Charter of Fundamental Rights of the European Union is one of the most recent legal instruments concerning human rights.

Natural Rights Theories

The existence of natural rights has been asserted by different individuals on different premises, such as a priori philosophical reasoning or religious principles. For example,

Immanuel Kant claimed to derive natural rights through "reason" alone. The Declaration of Independence, meanwhile, is based upon the "self-evident" truth that "all men are endowed by their Creator with certain unalienable Rights."

Likewise, different philosophers and statesmen have designed different lists of what they believe to be natural rights; almost all include the right to life and liberty as the two highest priorities. H. L. A. Hart argued that if there are any rights at all, there must be the right to liberty, for all the others would depend upon this. T. H. Green argued that "if there are such things as rights at all, then, there must be a right to life and liberty, or, to put it more properly to free life." John Locke emphasized "life, liberty and property" as primary. However, despite Locke's influential defence of the right of revolution, Thomas Jefferson substituted "pursuit of happiness" in place of "property" in the United States Declaration of Independence.

Thomas Hobbes

Thomas Hobbes included a discussion of natural rights in his moral and political philosophy. Hobbes' conception of natural rights extended from his conception of man in a "state of nature". Thus he argued that the essential natural right was "to use his own power, as he will himself, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own judgement, and Reason, he shall conceive to be the aptest means thereunto." Hobbes, to deny this right would be absurd, just as it would be absurd to expect that carnivores might reject meat or fish stop swimming.

Hobbes sharply distinguished this natural "liberty", from natural "laws", described generally as "a precept, or general rule, found out by reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving his life; and to omit, that, by which he thinketh it may best be preserved." In his natural state, just as to Hobbes, man's life consisted entirely of liberties and not at all of laws– "It followeth, that in such a condition, every man has the right to every thing; even to one another's body. And therefore, as

long as this natural Right of every man to every thing endureth, there can be no security to any man... of living out the time, which Nature ordinarily allow men to live." This would lead inevitably to a situation known as the "war of all against all", in which human beings kill, steal and enslave others in order to stay alive, and due to their natural lust for "Gain", "Safety" and "Reputation".

Hobbes reasoned that this world of chaos created by unlimited rights was highly undesirable, since it would cause human life to be "solitary, poor, nasty, brutish, and short". As such, if humans wish to live peacefully they must give up most of their natural rights and create moral obligations in order to establish political and civil society. This is one of the earliest formulations of the theory of government known as the social contract. Hobbes objected to the attempt to derive rights from "natural law," arguing that law and right though often confused, signify opposites, with law referring to obligations, while rights refer to the absence of obligations.

Since by our nature, we seek to maximize our well being, rights are prior to law, natural or institutional, and people will not follow the laws of nature without first being subjected to a sovereign power, without which all ideas of right and wrong are rendered insignificant—"Therefore before the names of Just and Unjust can have place, there must be some coercive Power, to compel men equally to the performance of their Covenants..., to make good that Propriety, which by mutual contract men acquire, in recompense of the universal Right they abandon: and such power there is none before the erection of the Commonwealth." This marked an important departure from medieval natural law theories which gave precedence to obligations over rights.

John Locke

John Locke was another prominent Western philosopher who conceptualized rights as natural and inalienable. Like Hobbes, Locke was a major social contract thinker. He said that man's natural rights are life, liberty, and property. It was once conventional wisdom that Locke greatly influenced the

American Revolutionary War with his writings of natural rights, but this claim has been the subject of protracted dispute in recent decades. For example, the historian Ray Forrest Harvey declared that Jefferson and Locke were at "two opposite poles" in their political philosophy, as evidenced by Jefferson's use in the Declaration of Independence of the phrase "pursuit of happiness" instead of "property".

More recently, the eminent legal historian John Phillip Reid has deplored contemporary scholars' "misplaced emphasis on John Locke," arguing that American revolutionary leaders saw Locke as a commentator on established constitutional principles. Thomas Pangle has defended Locke's influence on the Founding, claiming that historians who argue to the contrary either misrepresent the classical republican alternative to which they say the revolutionary leaders adhered, do not understand Locke, or point to someone else who was decisively influenced by Locke.

This position has also been sustained by Michael Zuckert. Locke, there are three natural rights:

Life: everyone is entitled to live once they are created.

Liberty: everyone is entitled to do anything they want to so long as it doesn't conflict with the first right.

Estate: everyone is entitled to own all they create or gain through gift or trade so long as it doesn't conflict with the first two rights.

The social contract is a contract between a being or beings of power and their people or followers. The King makes the laws to protect the three natural rights. The people may not agree on the laws, but they have to follow them. The people can be prosecuted and/or killed if they break these laws. If the King does not follow these rules, he can be overthrown.

Thomas Paine

Thomas Paine further elaborated on natural rights in his influential work Rights of Man emphasizing that rights cannot be granted by any charter because this would legally imply they can also be revoked and under such circumstances they would be reduced to privileges:

- It is a perversion of terms to say that a charter gives rights. It operates by a contrary effect—that of taking rights away. Rights are inherently in all the inhabitants; but charters, by annulling those rights, in the majority, leave the right, by exclusion, in the hands of a few. They consequently are instruments of injustice.

The fact therefore must be that the individuals themselves, each in his own personal and sovereign right, entered into a contract with each other to produce a government: and this is the only mode in which governments have a right to arise, and the only principle on which they have a right to exist.

Debate

Various definitions of inalienability include non-relinquishability, non-salability, and non-transferability. This concept has been recognized by libertarians as being central to the question of voluntary slavery, which Murray Rothbard dismissed as illegitimate and even self-contradictory. Stephan Kinsella argues that "viewing rights as alienable is perfectly consistent with—indeed, implied by—the libertarian non-aggression principle. Under this principle, only the initiation of force is prohibited; defensive, restitutive, or retaliatory force is not."

The concept of inalienable rights was criticized by Jeremy Bentham and Edmund Burke as groundless. Bentham and Burke, writing in the eighteenth century, claimed that rights arise from the actions of government, or evolve from tradition, and that neither of these can provide anything inalienable. Presaging the shift in thinking in the 19th century, Bentham famously dismissed the idea of natural rights as "nonsense on stilts". By way of contrast to the views of Burke and Bentham, the leading American revolutionary scholar James Wilson condemned Burke's view as "tyranny."

The signers of the Declaration of Independence deemed it a "self evident truth" that all men are "endowed by their Creator with certain unalienable Rights". Critics, however, could argue that use of the word "Creator" signifies that these rights are based on theological principles, and might question

which theological principles those are, or why those theological principles should be accepted by people who do not adhere to the religion from which they are derived. In "The Social Contract," Jean-Jacques Rousseau claims that the existence of inalienable rights is unnecessary for the existence of a constitution or a set of laws and rights. This idea of a social contract—that rights and responsibilities are derived from a consensual contract between the government and the people—is the most widely recognized alternative. Samuel P. Huntington, an American political scientist, wrote that the "inalienable rights" argument from the Declaration of Independence was necessary because "The British were white, Anglo, and Protestant, just as we were. They had to have some other basis on which to justify independence." Different philosophers have created different lists of rights they consider to be natural. Proponents of natural rights, in particular Hesselberg and Rothbard, have responded that reason can be applied to separate truly axiomatic rights from supposed rights, stating that any principle that requires itself to be disproved is an axiom.

Critics have pointed to the lack of agreement between the proponents as evidence for the claim that the idea of natural rights is merely a political tool. For instance, Jonathan Wallace has asserted that there is no basis on which to claim that some rights are natural, and he argued that Hobbes' account of natural rights confuses right with ability. Wallace advocates a social contract, much like Hobbes and Locke, but does not base it on natural rights: We are all at a table together, deciding which rules to adopt, free from any vague constraints, half-remembered myths, anonymous patriarchal texts and murky concepts of nature. If I propose something you do not like, tell me why it is not practical, or harms somebody, or is counter to some other useful rule; but don't tell me it offends the universe. Other critics have argued that the attempt to derive rights from "natural law" or "human nature" is an example of the is-ought problem. However, the term "natural" in "natural rights" refers to the opposite of "artificial", rather than meaning "physical" as it does in the sense of ethical naturalism, which

just as to G.E. Moore does suffer the is-ought problem in the form of the naturalistic fallacy. Hugh Gibbons has proposed a descriptive argument based on human biology. He claims that Human Beings were other-regarding as a matter of necessity, in order to avoid the costs of conflict.

Over time they developed expectations that individuals would act in certain ways which were then prescribed by society and that eventually crystallized into actionable rights. There is also debate as to whether all rights are either natural or legal. Fourth president of the United States James Madison, while representing Virginia in the House of Representatives, believed that there are rights, such as trial by jury, are social rights, that arising neither from natural law nor from positive law but from the social contract from which a government derives its authority.

CLAIM RIGHTS AND LIBERTY RIGHTS

Some philosophers and political scientists make a distinction between claim rights and liberty rights. A claim right is a right which entails responsibilities, duties, or obligations on other parties regarding the right-holder. In contrast, a liberty right is a right which does not entail obligations on other parties, but rather only freedom or permission for the right-holder. The distinction between these two senses of "rights" originates in American jurist Wesley Newcomb Hohfeld's analysis thereof in his seminal work Fundamental Legal Conceptions.

Liberty rights and claim rights are the inverse of one another: a person has a liberty right permitting him to do something only if there is no other person who has a claim right forbidding him from doing so; and likewise, if a person has a claim right against someone else, that other person's liberty is thus limited. This is because the deontic concepts of obligation and permission are De Morgan dual; a person is permitted to do all and only the things he is not obliged to refrain from, and obliged to do all and only the things he is not permitted to refrain from. A person's liberty right to x consists in his freedom to do or have x, while a person's claim

right to x consists in an obligation on others to allow or enable him to do or have x. For example, to assert a liberty right to free speech is to assert that you have permission to speak freely; that is, that you are not doing anything wrong by speaking freely. But that liberty right does not in itself entail that others are obligated to help you communicate the things you wish to say, or even that they would be wrong in preventing you from speaking freely.

To say these things would be to assert a claim right to free speech; to assert that others are obliged to refrain from preventing you from speaking freely or even perhaps obliged to aid your efforts at communication. Conversely, such claim rights do not entail liberty rights; *e.g.* laws prohibiting vigilante justice do not thereby condone or permit all the acts which such violent enforcement might otherwise have prevented. To show, a world with only liberty rights, without any claim rights, would by definition be a world wherein everything was permitted and no act or omission was prohibited; a world wherein none could rightly claim that they had been wronged or neglected.

Conversely, a world with only claim rights and no liberty rights would be a world wherein nothing was merely permitted, but all acts were either obligatory or prohibited. The assertion that people have a claim right to liberty—*i.e.* that people are obliged only to refrain from preventing each other from doing things which are permissible, their liberty rights limited only by the obligation to respect others' liberty—is the central thesis of liberal theories of justice.

Second-order Rights

Hohfeld's original analysis included two other types of right: besides claims and liberties, he wrote of powers, and immunities. The other two terms of Hohfeld's analysis, powers and immunities, refer to second-order liberties and claims, respectively. Powers are liberty rights regarding the modification of first-order rights, *e.g.* the U.S. Congress has certain powers to modify some of U.S. citizens' legal rights, inasmuch as it can impose or remove legal duties. Immunities,

conversely, are claim rights regarding the modification of first-order rights, *e.g.* U.S. citizens have, per their Constitution, certain immunities limiting the positive powers of the U.S. Congress to modify their legal rights. As such, immunities and powers are often subsumed within claims and liberties by later authors, or grouped together into “active rights” and “passive rights”.

These different types of rights can be used as building blocks to explain relatively complex matters such as a particular piece of property. For example, a right to use one’s computer can be thought of as a liberty right, but one has a power right to let somebody else use your computer, as well as a claim right against others using the computer; and further, you may have immunity rights protecting your claims and liberties regarding the computer.

POSITIVE AND NEGATIVE RIGHTS

Rights talk is a common theme in contemporary moral discourse. We speak freely of having all sorts of different rights. Our rights may or may not include a right to freedom of speech, life, non-interference, equal pay for equal work, etc. If somebody cares about it, you can bet someone, somewhere, has described it as a right. What’s not always mentioned, but well worth getting clear about, is whether certain rights are positive or negative, as well as why this makes a difference to our moral decision-making. Some rights are negative rights. Negative rights are typically rights to not be subjected to certain conditions, such as a right to freedom of speech or autonomy. Negative rights are often some varietal of a right to non-interference.

They impose duties on others to leave you alone and let you do things that are important to you, like speak your mind or make your own decisions. They also carry a great deal of normative weight, in that we place great importance upon not violating the negative rights of other people. Some of our rights are not negative, but positive. Positive rights are usually rights to receive some benefit, such as a right to an education or accessible health care. Positive rights differ substantially from

negative rights. First, negative rights are usually based on something about the bearer. Humans have a negative right to autonomy because humans are the sorts of creatures that make choices that matter to them. But positive rights are often not based on things about the bearer.

Some positive rights, like a right to be paid for work that you do, are based on agreements. Other positive rights are based on idealized conceptions of human interaction, such as a right to health care or clean water. Most importantly, positive rights are less stringent than negative rights. While I do you great harm by violating your right to autonomy, it's not necessarily true that I do you comparable harm by violating your right to health care. Your right to autonomy clearly correlates to a duty of non-interference for me, but it's less obvious what my duties are, if any, in virtue of your right to accessible health care. Positive rights less obviously correlate to identifiable duties for others, and violating them is often seen as preferable to violating a person's negative rights. Why does this distinction matter? There are at least two important implications.

First, rights often come into conflict with one another. When you are making a difficult moral decision that will lead to the inevitable violation of someone's rights, it might be helpful to identify what sorts of rights are at risk. If you have the option, you may be better off violating someone's positive right rather than a much more stringent and cherished negative right. The other important implication for this distinction is in the realm of public policy. There is very little resistance to the enshrinement of negative rights into law.

Most of them are already protected, and any that are not safeguarded are usually held in sufficiently high esteem that resistance to granting them the force of law is not significant. But positive rights are far trickier, and few politicians make the distinction between positive and negative rights, often because of the rhetorical strength of disguising a positive right as a negative one. For example, many politicians are pressing for a universal health care system, from the claim that people have a right to health care. This is a convincing statement if

one treats a right to health care like a negative right. Unfortunately, there is no obvious sense in which health care can be a negative right, because there is nothing about being a person that clearly entails a negative right to health care. However, this does not mean that we cannot have a positive right to health care. Positive rights can be the product of agreements.

If a society agrees that everyone has a positive right to health care, they are essentially creating this positive right. However, because positive rights are less stringent, it is an open question what sorts of duties a right to health care would impose on others. Whatever your views may be on the subject of a negative or positive right to health care, it is clear that the distinction makes a difference for how we think about rights in general. Not only can this distinction help us to resolve difficult moral dilemmas, it is also a useful tool for recognizing when rights talk is being employed as a rhetorical mechanism for political gains.

Difference between Positive and Negative Rights

Negative rights are often used to defend political rights such as freedom of speech, private property, a fair trial, freedom of worship and the right to be considered innocent until proven guilty. Positive rights may be called up to protect the person, property, right to counsel, public education, health care, social security, or a minimum standard of living. In the 'three generations' of human rights—liberty, equality and fraternity - negative rights are often linked with 'first-generation rights' or the liberty rights. Liberty rights pertain to the protection of basic human freedom such as speech, life and worship. Positive rights, on the other hand, are associated with 'second-generation rights' or the equality rights such as employment, health care or housing rights.

Both rights are covered by the Universal Declaration of Human Rights. Classical liberals and libertarians maintain that positive rights do not exist until they are established by a contract. The constitution often times guarantee negative rights such as the right to expression but not often include positive

rights. Positive rights however are created from other laws or as a result of other laws such as the need to provide public and free education, unemployment assistance and health care benefits. The rights are considered inalienable even absolute necessity. Positive and negative rights can be viewed as obligations instead of rights in order to clearly differentiate between the two. Negative obligation then is an obligation not to do while positive obligation obliges one to do something.

Criticism

Critics argue that the distinction between negative and positive rights is a false dichotomy. Some draw attention to the question of enforcement to argue that it is illogical for certain rights traditionally characterised as negative, such as the right to property or freedom from violence, to be so categorised. While rights to property and freedom from violence require that individuals refrain from fraud and theft, they can only be upheld by 'positive' actions by individuals or the state. Individuals can only defend the right to property by repelling attempted theft, while the state must make provision for a police force, or even army, which in turn must be funded through taxation.

It is therefore argued that these rights, although generally considered negative by libertarians and classical liberals, are in fact just as 'positive' or 'economic' in nature as 'positive' rights such as the right to an education. Jan Narveson, the view of some that there is no distinction between negative and positive rights on the ground that negative rights require police and courts for their enforcement is "mistaken". He says that the question between what one has a right to do and who if anybody enforces it are separate issues. If rights are only negative then it simply means no one has a duty to enforce them, although individuals have a right to use any non-forcible means to gain the cooperation of others in protecting those rights. Therefore, he says "the distinction between negative and positive is quite robust." Libertarians hold that positive rights, which would include a right to be protected, do not exist until they are created by contract. However, those who

hold this view do not mean that police, for example, are not obligated to protect the rights of citizens. Since they contract with their employers to defend citizens from violence, then they have created that obligation to their employer.

A negative right to life allows an individual to defend his life from others trying to kill him, or obtain voluntary assistance from others to defend his life—but he may not force others to defend him, because he has no natural right to be provided with defence. To force a person to defend one's own negative rights, or the negative rights of a third party, would be to violate that person's negative rights. Other advocates of the view that there is a distinction between negative and positive rights argue that the presence of a police force or army is not due to any positive right to these services that citizens claim, but rather because they are natural monopolies or public goods—features of any human society that arise naturally, even while adhering to the concept of negative rights only.

Robert Nozick discusses this idea at length in his book Anarchy, State, and Utopia. Some critics go further to hold that any right can be made to appear either positive or negative depending on the language used to define it. For instance, the right to be free from starvation is considered 'positive' on the grounds that it implies a starving person must be provided with food through the positive action of others, but on the other hand, as James P. Sterba argues, it might just as easily be characterised as the right of the starving person not to be interfered with in taking the surplus food of others.

He writes: What is at stake is the liberty of the poor not to be interfered with in taking from the surplus possessions of the rich what is necessary to satisfy their basic needs. Needless to say, libertarians would want to deny that the poor have this liberty. But how could they justify such a denial? As this liberty of the poor has been specified, it is not a positive right to receive something, but a negative right of non-interference. The discussion often centres on the nature of rights themselves; some philosophers argue that rights are purely moral principles rather than legal rules that should be enforced by governments. Thus, in this view, one person's negative right does not impose

a moral obligation on anybody else to affirmatively protect that right against aggressors; the obligation is only to refrain from violating it themselves: a negative obligation.

INDIVIDUAL AND GROUP RIGHTS

Group rights are rights held by a group rather than by its members separately, or rights held only by individuals within the specified group; in contrast, individual rights are rights held by individual people regardless of their group membership or lack thereof. Group rights have historically been used both to infringe upon and to facilitate individual rights, and the concept remains controversial. Group rights are not straightforwardly human rights because they are group-differentiated rather than universal to all people just by virtue of being human.

In Western discourse, individual rights are often associated with political and economic freedom, whereas group rights are associated with social control. This is because in the West the establishment of individual rights is associated with equality before the law and protection from the state. Examples of this are the Magna Carta, in which the English King accepted that his will could be bound by the law and certain rights of the King's subjects were explicitly protected. By contrast, much of the recent political discourse on individual rights in the People's Republic of China, particularly with respect to due process rights and rule of law, has focused on how protection of individual rights actually makes social control by the government more effective.

For example, it has been argued that the people are less likely to violate the law if they believe that the legal system is likely to punish them if they actually violated the law and not punish them if they did not violate the law. By contrast, if the legal system is arbitrary then an individual has no incentive to actually follow the law.

Racism

Group rights may have a negative connotation in the context of colonialism, legalised racism and white nationalism.

In this context group rights award rights to a privileged group. For example, in South Africa under the former apartheid regime, which classified inhabitants and visitors into racial groups. Rights were awarded on a group basis, creating first and second class citizens.

In the United States individual rights for all by virtue of being human were only established after the Civil War, in 1868, with the Fourteenth Amendment to the Constitution. The Fourteenth Amendment was intended to secure rights for former slaves and amongst others includes the Due Process and Equal Protection.

Affirmative Action

In the modern context, 'group rights' are argued for by some as an instrument to actively facilitate the realisation of equality. In a society where there is already equality before the law for all citizens, 'equality' is often an euphemistic reference to material equality. This is where the group is regarded as being in a situation such that it needs special protective rights if its members are to enjoy living conditions on terms equal with the majority of the population. Examples of such groups may include indigenous peoples, ethnic minorities, women, children and the disabled.

This discourse may takes place in the context of negative and positive rights in that some commentators and policy makers conceptualise equality as not only a negative right, in the sense of ensuring freedom from discrimination, but also a positive right, in that the realisation of equality requires redistributive action by others or the state. In this respect group rights may aim to ensure equal opportunity and/or attempt to actively redress inequality. An example this is the Black Economic Empowerment programme in post-Apartheid South Africa.

The South African government seeks to redress the inequalities of Apartheid by giving previously disadvantaged groups economic opportunities previously not available to them. It includes measures such as Employment Equity, skills development, reverse racism, ownership, management, socio-

economic development and preferential procurement. The South African Bill of Rights, contained in the South African Constitution contains strong provisions on equality, or the right to equality. But the Bill of Rights states that "discrimination... is unfair unless it is established that the discrimination is fair." This implies that the rational behind the Black Economic Empowerment programme is fair, despite infringing the absolute application of the right to equality. Government programmes of reverse discrimination or positive discrimination exist in a number of countries: the British government seeks to favour historically disadvantaged groups at the expense of members of a historically dominant group in the areas of university admissions or employment.

Similarly, non-quota race preferences is in place in the United States for collegiate admission to government-run educational institutions. Group rights in such a context may aim to achieve equality of opportunity and/or equality of outcome. Such affirmative action can be controversial as they are in conflict with the absolute application of the right to equality, or because some members of the group that is intended to benefit from such programmes criticizes or opposes them.

Constitutions

In the United States, the Constitution outlines individual rights within the Bill of Rights. In Canada, the Canadian Charter of Rights and Freedoms serves the same function. One of the key differences between the two documents is that some rights in the Canadian Charter can be overridden by governments if they deliberately do so and "the resulting balance of individual rights and social rights remains appropriate to a free and democratic society" after the change. In practice, the Quebec government used the provision frequently in the early 1980s as a protest, and since then to maintain a ban on non-French public signs for five years.

The government of Saskatchewan has used it for back-to-work legislation, and the government of Alberta sought to use it to define marriage as strictly heterosexual. In contrast, in

the United States, no such override exists even in theory; even a constitutional amendment could not remove these rights entirely, as they are considered inalienable under the natural rights principles the Constitution is founded upon.

Philosophies

In the MINARCHIST political views of libertarians and classical liberals, the role of the government is solely to identify, protect, and enforce the natural rights of the individual while attempting to assure just remedies for transgressions. Liberal governments that respect individual rights often provide for systemic controls that protect individual rights such as a system of due process in criminal justice.

Collectivist states are generally considered to be oppressive by such classical liberals and libertarians precisely because they do not respect individual rights. Interceding within that spectrum for the actual availing of collective governance to be allotted systematization and their undivided agency, but relegated for the regulation of such freedom towards constructed entities is the federative process. A faculty of federalism that lends to relative de-standardization of governance under its auspices, unlike libertarian or socialistic manners of state. Federated structures allow for diversity of power distribution between the alternating group and individual interest schemata where neither liberal nor collective type governing alone can codify in variation.

Ayn Rand, developer of the philosophy of Objectivism asserted that a group, as such, has no rights. A man can neither acquire new rights by joining a group nor lose the rights which he does possess. The principle of individual rights is the only moral base of all groups or associations. She maintained that since only an individual man can possess rights, the expression "individual rights" is a redundancy, but the expression "collective rights" is a contradiction in terms.

Individual rights are not subject to a public vote; a majority has no right to vote away the rights of a minority; the political function of rights is precisely to protect minorities from oppression by majorities.

Chapter 10

Declarations

CAIRO DECLARATION ON HUMAN RIGHTS IN ISLAM

The Nineteenth Islamic Conference of Foreign Ministers held in Cairo, Arab Republic of Egypt, from 9-14 Muharram 1411H,

- Keenly aware of the place of mankind in Islam as vicegerent of Allah on Earth;
- Recognizing the importance of issuing a Document on Human Rights in Islam that will serve as a guide for Member states in all aspects of life;
- Having examined the stages through which the preparation of this draft Document has so far, passed and the relevant report of the Secretary General;
- Having examined the Report of the Meeting of the Committee of Legal Experts held in Tehran from 26 to 28 December, 1989;
- Agrees to issue the Cairo Declaration on Human Rights in Islam that will serve as a general guidance for Member States in the field of Human Rights.

Reaffirming the civilizing and historical role of the Islamic Ummah which Allah made as the best community and which gave humanity a universal and well-balanced civilization, in which harmony is established between hereunder and the hereafter, knowledge is combined with faith, and to fulfill the expectations from this community to guide all humanity which is confused because of different and conflicting beliefs and ideologies and to provide solutions for all chronic problems of

this materialistic civilization. In contribution to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari'ah.

Convinced that mankind which has reached an advanced stage in materialistic science is still, and shall remain, in dire need of faith to support its civilization as well as a self motivating force to guard its rights; Believing that fundamental rights and freedoms just as to Islam are an integral part of the Islamic religion and that no one shall have the right as a matter of principle to abolish them either in whole or in part or to violate or ignore them in as much as they are binding divine commands.

Which are contained in the Revealed Books of Allah and which were sent through the last of His Prophets to complete the preceding divine messages and that safeguarding those fundamental rights and freedoms is an act of worship whereas the neglect or violation thereof is an abominable sin, and that the safeguarding of those fundamental rights and freedom is an individual responsibility of every person and a collective responsibility of the entire Ummah; Do hereby and on the basis of the principles declare as follows:

- *Article* 1:
  - All human beings form one family whose members are united by their subordination to Allah and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations. The true religion is the guarantee for enhancing such dignity along the path to human integrity.
  - All human beings are Allah's subjects, and the most loved by Him are those who are most beneficial to His subjects, and no one has superiority over another except on the basis of piety and good deeds.

- *Article* 2:
  - Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to safeguard this right against any violation, and it is prohibited to take away life except for a shari'ah prescribed reason.
  - It is forbidden to resort to any means which could result in the genocidal annihilation of mankind.
  - The preservation of human life throughout the term of time willed by Allah is a duty prescribed by Shari'ah.
  - Safety from bodily harm is a guaranteed right. It is the duty of the state to safeguard it, and it is prohibited to breach it without a Shari'ah-prescribed reason.
- *Article* 3:
  - In the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men, women and children. The wounded and the sick shall have the right to medical treatment; and prisoners of war shall have the right to be fed, sheltered and clothed. It is prohibited to mutilate or dismember dead bodies. It is required to exchange prisoners of war and to arrange visits or reunions of families separated by circumstances of war.
  - It is prohibited to cut down trees, to destroy crops or livestock, to destroy the enemy's civilian buildings and installations by shelling, blasting or any other means.
- *Article* 4: Every human being is entitled to human sanctity and the protection of one's good name and honour during one's life and after one's death. The state and the society shall protect one's body and burial place from desecration.
- *Article* 5:
  - The family is the foundation of society, and

marriage is the basis of making a family. Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from exercising this right.
  - The society and the State shall remove all obstacles to marriage and facilitate it, and shall protect the family and safeguard its welfare.
- *Article* 6:
  - Woman is equal to man in human dignity, and has her own rights to enjoy as well as duties to perform, and has her own civil entity and financial independence, and the right to retain her name and lineage.
  - The husband is responsible for the maintenance and welfare of the family.
- *Article* 7:
  - As of the moment of birth, every child has rights due from the parents, the society and the state to be accorded proper nursing, education and material, hygienic and moral care. Both the fetus and the mother must be safeguarded and accorded special care.
  - Parents and those in such like capacity have the right to choose the type of education they desire for their children, provided they take into consideration the interest and future of the children in accordance with ethical values and the principles of the Shari'ah.
  - Both parents are entitled to certain rights from their children, and relatives are entitled to rights from their kin, in accordance with the tenets of the shari'ah.
- *Article* 8: Every human being has the right to enjoy a legitimate eligibility with all its prerogatives and obligations in case such eligibility is lost or impaired, the person shall have the right to be represented by his/her guardian.

- *Article* 9:
  - The seeking of knowledge is an obligation and provision of education is the duty of the society and the State. The State shall ensure the availability of ways and means to acquire education and shall guarantee its diversity in the interest of the society so as to enable man to be acquainted with the religion of Islam and uncover the secrets of the Universe for the benefit of mankind.
  - Every human being has a right to receive both religious and worldly education from the various institutions of teaching, education and guidance, including the family, the school, the university, the media, etc., and in such an integrated and balanced manner that would develop human personality, strengthen man's faith in Allah and promote man's respect to and defence of both rights and obligations.
- *Article* 10: Islam is the religion of true unspoiled nature. It is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or to atheism.
- *Article* 11:
  - Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to Allah the Almighty.
  - Colonialism of all types being one of the most evil forms of enslavement is totally prohibited. Peoples suffering from colonialism have the full right to freedom and self-determination. It is the duty of all States peoples to support the struggle of colonized peoples for the liquidation of all forms of and occupation, and all States and peoples have the right to preserve their independent identity and econtrol over their wealth and natural resources.
- *Article* 12: Every man shall have the right, within the

framework of the Shari'ah, to free movement and to select his place of residence whether within or outside his country and if persecuted, is entitled to seek asylum in another country. The country of refuge shall be obliged to provide protection to the asylum-seeker until his safety has been attained, unless asylum is motivated by committing an act regarded by the Shari'ah as a crime.

- *Article* 13: Work is a right guaranteed by the State and the Society for each person with capability to work. Everyone shall be free to choose the work that suits him best and which serves his interests as well as those of the society. The employee shall have the right to enjoy safety and security as well as all other social guarantees. He may not be assigned work beyond his capacity nor shall he be subjected to compulsion or exploited or harmed in any way. He shall be entitled—without any discrimination between males and females—to fair wages for his work without delay, as well as to the holidays allowances and promotions which he deserves. On his part, he shall be required to be dedicated and meticulous in his work. Should workers and employers disagree on any matter, the State shall intervene to settle the dispute and have the grievances redressed, the rights confirmed and justice enforced without bias.
- *Article* 14: Everyone shall have the right to earn a legitimate living without monopolization, deceit or causing harm to oneself or to others. Usury is explicitly prohibited.
- *Article* 15:
  - Everyone shall have the right to own property acquired in a legitimate way, and shall be entitled to the rights of ownership without prejudice to oneself, others or the society in general. Expropriation is not permissible except for requirements of public interest and upon payment of prompt and fair compensation.

  - Confiscation and seizure of property is prohibited except for a necessity dictated by law.
- *Article* 16: Everyone shall have the right to enjoy the fruits of his scientific, literary, artistic or technical labour of which he is the author; and he shall have the right to the protection of his moral and material interests stemming therefrom, provided it is not contrary to the principles of the Shari'ah.
- *Article* 17:
  - Everyone shall have the right to live in a clean environment, away from vice and moral corruption, that would favour a healthy ethical development of his person and it is incumbent upon the State and society in general to afford that right.
  - Everyone shall have the right to medical and social care, and to all public amenities provided by society and the State within the limits of their available resources.
  - The States shall ensure the right of the individual to a decent living that may enable him to meet his requirements and those of his dependents, including food, clothing, housing, education, medical care and all other basic needs.
- *Article* 18:
  - Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property.
  - Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. The State shall protect him from arbitrary interference.
  - A private residence is inviolable in all cases. It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall

it be demolished or confiscated and its dwellers evicted.

- *Article* 19:
  - All individuals are equal before the law, without distinction between the ruler and the ruled.
  - The right to resort to justice is guaranteed to everyone.
  - Liability is in essence personal.
  - There shall be no crime or punishment except as provided for in the Shari'ah.
  - A defendant is innocent until his guilt is proven in a fast trial in which he shall be given all the guarantees of defence.
- *Article* 20: It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of maltreatment, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experiments without hisconsent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.
- *Article* 21: Taking hostages under any form or for any purpose is expressly forbidden.
- *Article* 22:
  - Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah.
  - Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil just as to the norms of Islamic Shari'ah.
  - Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical Values or disintegrate, corrupt or harm society or weaken its faith.

  - It is not permitted to excite nationalistic or doctrinal hatred or to do anything that may be an incitement to any form or racial discrimination.
- *Article* 23:
  - Authority is a trust; and abuse or malicious exploitation thereof is explicitly prohibited, in order to guarantee fundamental human rights.
  - Everyone shall have the right to participate, directly or indirectly in the administration of his country's public affairs. He shall also have the right to assume public office in accordance with the provisions of Shari'ah.
- *Article* 24: All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah.
- *Article* 25: The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration.

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the United Nations General Assembly during its 62nd session at UN Headquarters in New York City on 13 September 2007. While as a General Assembly Declaration it is not a legally binding instrument under international law, just as to a UN press release, it does "represent the dynamic development of international legal norms and it reflects the commitment of the UN's member states to move in certain directions". The UN describes it as setting "an important standard for the treatment of indigenous peoples that will undoubtedly be a significant tool towards eliminating human rights violations against the planet's 370 million indigenous people and assisting them in combating discrimination and marginalisation."

Purpose

The Declaration sets out the individual and collective

rights of indigenous peoples, as well as their rights to culture, identity, language, employment, health, education and other issues. It also "emphasizes the rights of indigenous peoples to maintain and strengthen their own institutions, cultures and traditions, and to pursue their development in keeping with their own needs and aspirations". It "prohibits discrimination against indigenous peoples", and it "promotes their full and effective participation in all matters that concern them and their right to remain distinct and to pursue their own visions of economic and social development".

Negotiation and Ratification

The Declaration was over 22 years in the making. The idea originated in 1982 when the UN Economic and Social Council (ECOSOC) set up its Working Group on Indigenous Populations (WGIP), established as a result of a study by Special Rapporteur José R. Martínez Cobo on the problem of discrimination faced by indigenous peoples. Tasked with developing human rights standards that would protect indigenous peoples, in 1985 the Working Group began working on drafting the Declaration on the Rights of Indigenous Peoples. The draft was finished in 1993 and was submitted to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which gave its approval the following year.

The Draft Declaration was then referred to the Commission on Human Rights, which established another Working Group to examine its terms. Over the following years this Working Group met on 11 occasions to examine and fine-tune the Draft Declaration and its provisions. Progress was slow because of certain states' concerns regarding some key provisions of the Declaration, such as indigenous peoples' right to self-determination and the control over natural resources existing on indigenous peoples' traditional lands. The final version of the Declaration was adopted on 29 June 2006 by the 47-member Human Rights Council with 30 member states in favour, two against, 12 abstentions, and three absentees. The Declaration was then referred to the General Assembly,

which voted on the adoption of the proposal on 13 September 2007 during its 61st regular session. The vote was 143 countries in favour, four against, and 11 abstaining.

The four member states that voted against were Australia, Canada, New Zealand and the United States, all of which have their origins as colonies of the United Kingdom and have large non-indigenous immigrant majorities and small remnant indigenous populations. Australia and New Zealand have since changed their votes in favour of the Declaration, in 2009 and 2010 respectively. The abstaining countries were Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine; another 34 member states were absent from the vote. Colombia and Samoa have since endorsed the document.

Reaction

Support

In contrast to the Declaration's rejection by Australia, Canada, New Zealand and the United States, United Nations officials and other world leaders expressed pleasure at its adoption. Secretary-General Ban Ki-moon described it as a "historic moment when UN Member States and indigenous peoples have reconciled with their painful histories and are resolved to move forward together on the path of human rights, justice and development for all." Louise Arbour, a former justice of the Supreme Court of Canada then serving as the UN's High Commissioner for Human Rights, expressed satisfaction at the hard work and perseverance that had finally "borne fruit in the most comprehensive statement to date of indigenous peoples' rights."

Similarly, news of the Declaration's adoption was greeted with jubilation in Africa and, present at the General Assembly session in New York, Bolivian foreign minister David Choquehuanca said that he hoped the member states that had voted against or abstained would reconsider their refusal to support a document he described as being as important as the Universal Declaration of Human Rights. Bolivia has become the first country to approve the U.N. declaration of indigenous

rights. Evo Morales, President of Bolivia, stated, "We are the first country to turn this declaration into a law and that is important, brothers and sisters.

We recognize and salute the work of our representatives. But if we were to remember the indigenous fight clearly, many of us who are sensitive would end up crying in remembering the discrimination, the scorn." Stephen Corry, Director of the international indigenous rights organization Survival International, said, "The declaration has been debated for nearly a quarter century. Years which have seen many tribal peoples, such as the Akuntsu and Kanoê in Brazil, decimated and others, such as the Innu in Canada, brought to the edge. Governments that oppose it are shamefully fighting against the human rights of their most vulnerable peoples. Claims they make to support human rights in other areas will be seen as hypocritical."

Criticism

Prior to the adoption of the Declaration, and throughout the 62nd session of the General Assembly, a number of countries expressed concern about some key issues, such as self-determination, access to lands, territories and resources and the lack of a clear definition of the term indigenous. These concerns were expressed by a group of African countries, in addition to the final four that voted against the adoption of the declaration. Ultimately, after agreeing on some adjustments to the Draft Declaration, a vast majority of states recognized that these issues could be addressed by each country at the national level. The four states that voted against–continued to express serious reservations about the final text of the Declaration as placed before the General Assembly. Two of the four opposing countries, Australia and New Zealand, have since then changed their vote in favour of the Declaration.

Australia

Australia's government opposed the Declaration in the General Assembly vote of 2007, but has since endorsed the declaration. Australia's Mal Brough, Minister for Families,

Community Services and Indigenous Affairs, referring to the provision regarding the upholding of indigenous peoples' customary legal systems, said that, "There should only be one law for all Australians and we should not enshrine in law practices that are not acceptable in the modern world." Marise Payne, Liberal Party Senator for New South Wales, further elaborated on the Australian government's objections to the Declaration in a speech to the Senate as:

- Concerns about references to self-determination and their potential to be misconstrued.
- Ignorance of contemporary realities concerning land and resources. "They seem, to many readers, to require the recognition of Indigenous rights to lands which are now lawfully owned by other citizens, both Indigenous and non-Indigenous, and therefore to have some quite significant potential to impact on the rights of third parties."
- Concerns over the extension of Indigenous intellectual property rights under the declaration as unnecessary under current international and Australian law.
- The potential abuse of the right under the Declaration for indigenous peoples to unqualified consent on matters affecting them, "which implies to some readers that they may then be able to exercise a right of veto over all matters of state, which would include national laws and other administrative measures."
- The exclusivity of indigenous rights over intellectual, real and cultural property, that "does not acknowledge the rights of third parties—in particular, their rights to access Indigenous land and heritage and cultural objects where appropriate under national law." Furthermore, that the Declaration "fails to consider the different types of ownership and use that can be accorded to Indigenous people and the rights of third parties to property in that regard."
- Concerns that the Declaration places indigenous customary law in a superior position to national law, and that this may "permit the exercise of practices

which would not be acceptable across the board", such as customary corporal and capital punishments.

In October 2007, former Australian Prime Minister John Howard pledged to hold a referendum on changing the constitution to recognise indigenous Australians if re-elected. He said that the distinctiveness of people's identity and their rights to preserve their heritage should be acknowledged. On 3 April 2009, the Rudd government formally endorsed the Declaration.

Canada

The Canadian government said that while it supported the spirit of the declaration, it contained elements that were "fundamentally incompatible with Canada's constitutional framework," which includes both the Charter of Rights and Freedoms and Section 35, which enshrines aboriginal and treaty rights. In particular, the Canadian government had problems with Article 19 and Articles 26 and 28. Minister of Indian Affairs and Northern Development Chuck Strahl described the document as "unworkable in a Western democracy under a constitutional government." Strahl elaborated, saying "In Canada, you are balancing individual rights *vs.* collective rights, and document has none of that. By signing on, you default to this document by saying that the only rights in play here are the rights of the First Nations. And, of course, in Canada, that's inconsistent with our constitution."

He gave an example: "In Canada ... you negotiate on this ... because don't trump all other rights in the country. You need also to consider the people who have sometimes also lived on those lands for two or three hundred years, and have hunted and fished alongside the First Nations." The Assembly of First Nations passed a resolution in December 2007 to invite Presidents Hugo Chávez and Evo Morales to Canada to put pressure on the government to sign the Declaration on the Rights of Indigenous Peoples, calling the two heads of state "visionary leaders" and demanding Canada resign its membership on the United Nations Human Rights Council. On 3 March 2010, in the Speech From the Throne, the

Governor General of Canada announced that the government was moving to endorse the declaration. "We are a country with an Aboriginal heritage. A growing number of states have given qualified recognition to the United Nations Declaration on the Rights of Indigenous Peoples. Our Government will take steps to endorse this aspirational document in a manner fully consistent with Canada's Constitution and laws."

New Zealand

In 2007 New Zealand's Minister of Mâori Affairs Parekura Horomia described the Declaration as "toothless", and said, "There are four provisions we have problems with, which make the declaration fundamentally incompatible with New Zealand's constitutional and legal arrangements." Article 26 in particular, he said, "appears to require recognition of rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous. This ignores contemporary reality and would be impossible to implement."

In response, Mâori Party leader Pita Sharples said it was "shameful to the extreme that New Zealand voted against the outlawing of discrimination against indigenous people; voted against justice, dignity and fundamental freedoms for all." On 7 July 2009 the New Zealand government announced that it would support the Declaration; this, however, appeared to be a premature announcement by Pita Sharples, the current Minister of Mâori Affairs, as the New Zealand government cautiously backtracked on Sharples' July announcement. However in April 2010 Pita Sharples announced New Zealand's support of the declaration at a speech in New York. On 19 April 2010 it was announced by Pita Sharples that New Zealand endorsed the UN declaration.

United States

Speaking for the United States mission to the UN, spokesman Benjamin Chang said, "What was done today is not clear. The way it stands now is subject to multiple interpretations and doesn't establish a clear universal principle." The U.S. mission also issued a floor document, "Observations

of the United States with respect to the Declaration on the Rights of Indigenous Peoples", setting out its objections to the Declaration. Most of these are based on the same points as the three other countries' rejections but, in addition, the United States drew attention to the Declaration's failure to provide a clear definition of exactly whom the term "indigenous peoples" is intended to cover.

United Kingdom

Speaking on behalf of the United Kingdom government, UK Ambassador and Deputy Permanent Representative to the United Nations, Karen Pierce, "emphasized that the Declaration was non-legally binding and did not propose to have any retroactive application on historical episodes. National minority groups and other ethnic groups within the territory of the United Kingdom and its overseas territories did not fall within the scope of the indigenous peoples to which the Declaration applied."

UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights is a declaration adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot in Paris. The Declaration has been translated into at least 375 languages and dialects. The Declaration arose directly from the experience of the Second World War and represents the first global expression of rights to which all human beings are entitled. It consists of 30 articles which have been elaborated in subsequent international treaties, regional human rights instruments, national constitutions and laws.

The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols. In 1966 the General Assembly adopted the two detailed Covenants, which complete the International Bill of Human Rights.

History

Conception

European philosophers of the Age of Enlightenment developed theories of natural law that influenced the adoption of documents such as the Bill of Rights of England, the Bill of Rights in the United States, and the Declaration of the Rights of Man and of the Citizen in France. National and International pressure for an international bill of rights had been building throughout World War II. In his 1941 State of the Union address US president Franklin Roosevelt called for the protection of what he termed the "essential" Four Freedoms: freedom of speech, freedom of conscience, freedom from fear and freedom from want, as its basic war aims. This has been seen as part of a movement of the 1940s that sought to make human rights part of the conditions for peace at the end of the war.

The United Nations Charter "reaffirmed faith in fundamental human rights, and dignity and worth of the human person" and committed all member states to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion". When the atrocities committed by Nazi Germany became public knowledge around the world after World War II, the consensus within the world community was that the United Nations Charter did not sufficiently define the rights it referenced. A universal declaration that specified the rights of individuals was necessary to give effect to the Charter's provisions on human rights.

Drafting

Canadian John Peters Humphrey was called upon by the United Nations Secretary-General to work on the project and became the Declaration's principal drafter. At the time Humphrey was newly appointed as Director of the Division of Human Rights within the United Nations Secretariat. The Commission on Human Rights, a standing body of the United Nations, was constituted to undertake the work of preparing

what was initially conceived as an International Bill of Rights. The membership of the Commission was designed to be broadly representative of the global community with representatives of the following countries serving: Australia, Belgium, Byelorussian Soviet Socialist Republic, Chile, China, Cuba, Egypt, France, India, Iran, Lebanon, Panama, Philippines, United Kingdom, United States, Soviet Union, Uruguay and Yugoslavia.

Adoption

The Universal Declaration was adopted by the General Assembly on 10 December 1948 by a vote of 48 in favour, 0 against, with 8 abstentions. The following countries voted in favour of the Declaration: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Thailand, Sweden, Syria, Turkey, United Kingdom, United States, Uruguay and Venezuela. Despite the central role played by Canadian John Humphrey, the Canadian Government at first abstained from voting on the Declaration's draft, but later voted in favour of the final draft in the General Assembly.

Structure

The underlying structure of the Universal Declaration was introduced in its second draft which was prepared by Rene Cassin. Cassin worked from a first draft prepared by John Peters Humphrey. The structure was influenced by the Code Napoleon, including a preamble and introductory general principles. Cassin compared the Declaration to the portico of a Greek temple, with a foundation, steps, four columns and a pediment. Articles 1 and 2 are the foundation blocks, with their principles of dignity, liberty, equality and brotherhood. The seven paragraphs of the preamble, setting out the reasons for the Declaration, are represented by the steps. The main

body of the Declaration forms the four columns. The first column constitutes rights of the individual, such as the right to life and the prohibition of slavery.

The second column constitutes the rights of the individual in civil and political society. The third column is concerned with spiritual, public and political freedoms such as freedom of religion and freedom of association. The fourth column sets out social, economic and cultural rights. In Cassin's model, the last three articles of the Declaration provide the pediment which binds the structure together. These substances are concerned with the duty of the individual to society and the prohibition of use of rights in contravention of the purposes of the United Nations.

With regard to the Communist block's abstentions, the 9 December Velodrome d'Hiver meeting of 20,000 Parisiens at the invitation of World Citizen Garry Davis and his "Conseil de Solidarité" who had interrupted a General Assembly session on 22 November to call for a world government, provoked its abstention rather than voting against the human rights document. Eleanor Roosevelt in her column "My Day" wrote on 15 December that "Garry Davis, the young man who in Paris as a citizen of the world...has succeeded in getting the backing of a few intellectuals and even has received a cablegram from Albert Einstein telling him, from Professor Einstein's point of view, that the United Nations has not yet achieved peace.

The United Nations, of course, is not set up to achieve peace. That the governments are supposed to do themselves. But it is expected to help preserve peace, and that I think, is it doing more effectively day by day...During a pleneary session in the General Assembly, this young man tried to make a speech from the balcony on the subject of how incompetent the United Nations is to deal with the questions before it. How much better it would be if Mr. Davis would set up his own governmental organisation and start then and there a worldwide international government. All who would join him would learn that they had no nationality and, therefore, not being bothered by any special interest in any one country,

everyone would develop...a completely cooperative feeling among all peoples and a willingness to accept any laws passes by this super government."

Preamble

The Universal Declaration begins with a preamble consisting of seven paragraphs followed by a statement "proclaiming" the Declaration. Each paragraph of the preamble sets out a reason for the adoption of the Declaration. The first paragraph asserts that the recognition of human dignity of all people is the foundation of justice and peace in the world. The second paragraph observes that disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind and that the four freedoms: freedom of speech, belief, freedom from want, and freedom from fear–which is "proclaimed as the highest aspiration" of the people.

The third paragraph states that so that people are not compelled to rebellion against tyranny, human rights should be protected by rule of law. The fourth paragraph relates human rights to the development of friendly relations between nations. The fifth paragraph links the Declaration back to the United Nations Charter which reaffirms faith in fundamental human rights and dignity and worth of the human person. The sixth paragraph notes that all members of the United Nations have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.

The seventh paragraph observes that "a common understanding" of rights and freedoms is of "the greatest importance" for the full realisation of that pledge. These paragraphs are followed by the "proclamation" of the Declaration as a "common standard of achievement" for "all peoples and all nations", so that "all individuals" and "all organs of society" should by teaching and education, promote respect for these rights and freedoms and by progressive measures, national and international, secure their universal and effective recognition and observance.

The Preamble is:

- Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
- Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,
- Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,
- Whereas it is essential to promote the development of friendly relations between nations,
- Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,
- Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,
- Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,
- Now, Therefore the general assembly proclaims this universal declaration of human rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by

progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Human Rights Set Out in the Declaration

The following reproduces the articles of the Declaration which set out the specific human rights that are recognised in the Declaration.

- *Article* 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
- *Article* 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.
- *Article* 3: Everyone has the right to life, liberty and security of person.
- *Article* 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.
- *Article* 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- *Article* 6: Everyone has the right to recognition everywhere as a person before the law.
- *Article* 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

- *Article* 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.
- *Article* 9: No one shall be subjected to arbitrary arrest, detention or exile.
- *Article* 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
- *Article* 11: Everyone charged with a penal offence has the right to be presumed innocent until proved guilty just as to law in a public trial at which he has had all the guarantees necessary for his defence.
  - No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.
- *Article* 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.
- *Article* 13:
  - Everyone has the right to freedom of movement and residence within the borders of each state.
  - Everyone has the right to leave any country, including their own, and to return to their country.
- *Article* 14:
  - Everyone has the right to seek and to enjoy in other countries asylum from persecution.
  - This right may not be invoked in the case of prosecutions genuinely arising from non-political

crimes or from acts contrary to the purposes and principles of the United Nations.

- *Article* 15:
  - Everyone has the right to a nationality.
  - No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.
- *Article* 16:
  - Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
  - Marriage shall be entered into only with the free and full consent of the intending spouses.
  - The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
- *Article* 17:
  - Everyone has the right to own property alone as well as in association with others.
  - No one shall be arbitrarily deprived of his property.
- *Article* 18: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.
- *Article* 19: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
- *Article* 20: Everyone has the right to freedom of peaceful assembly and association.
  - No one may be compelled to belong to an association.

- *Article* 21:
  - Everyone has the right to take part in the government of their country, directly or through freely chosen representatives.
  - Everyone has the right of equal access to public service in their country.
  - The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.
- *Article* 22: Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.
- *Article* 23:
  - Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
  - Everyone, without any discrimination, has the right to equal pay for equal work.
  - Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
  - Everyone has the right to form and to join trade unions for the protection of his interests.
- *Article* 24: Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.
- *Article* 25:
  - Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing

and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
  - Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.
- *Article* 26:
  - Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
  - Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
  - Parents have a prior right to choose the kind of education that shall be given to their children.
- *Article* 27:
  - Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
  - Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
- *Article* 28: Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.

- *Article* 29:
  - Everyone has duties to the community in which alone the free and full development of his personality is possible.
  - In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
  - These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.
- *Article* 30: Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Commemoration: International Human Rights Day

The adoption of the Universal Declaration is a significant international commemoration marked each year on 10 December and is known as Human Rights Day or International Human Rights Day. The commemoration is observed by individuals, community and religious groups, human rights organisations, parliaments, governments and the United Nations. Decadal commemorations are often accompanied by campaigns to promote awareness of the Declaration and human rights. 2008 marked the 60th anniversary of the Declaration and was accompanied by year long activities around the theme "Dignity and justice for all of us".

Significance and Legal Effect

Significance

In the preamble, governments commit themselves and their peoples to measures to secure the universal and effective recognition and observance of the human rights set out in the

Declaration. Eleanor Roosevelt supported the adoption the UDHR as a declaration, rather than as a treaty, because she believed that it would have the same kind of influence on global society as the United States Declaration of Independence had within the United States. In this she proved to be correct. Even though not formally legally binding, the Declaration has been adopted in or influenced most national constitutions since 1948. It also serves as the foundation for a growing number of international treaties and national laws and international, regional, national and sub-national institutions protecting and promoting human rights.

Legal Effect

While not a treaty itself, the Declaration was explicitly adopted for the purpose of defining the meaning of the words "fundamental freedoms" and "human rights" appearing in the United Nations Charter, which is binding on all member states. For this reason, the Universal Declaration is a fundamental constitutive document of the United Nations. Many international lawyers, in addition, believe that the Declaration forms part of customary international law and is a powerful tool in applying diplomatic and moral pressure to governments that violate any of its substances.

The 1968 United Nations International Conference on Human Rights advised that it "constitutes an obligation for the members of the international community" to all persons. The declaration has served as the foundation for two binding UN human rights covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and the principles of the Declaration are elaborated in international treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of Discrimination Against Women, the United Nations Convention on the Rights of the Child, the United Nations Convention Against Torture and many more.

The Declaration continues to be widely cited by governments, academics, advocates and constitutional courts

and individual human beings who appeal to its principles for the protection of their recognised human rights.

Reaction

Praise

The Universal Declaration has received praise from a number of notable people. Charles Malik, Lebanese philosopher and diplomat, called it "an international document of the first order of importance," while Eleanor Roosevelt, first chairwoman of the Commission on Human Rights that drafted the Declaration, stated that it "may well become the international Magna Carta of all men everywhere." 10 December 1948. In a speech on 5 October 1995, Pope John Paul II called the UDHR "one of the highest expressions of the human conscience of our time." And in a statement on 10 December 2003 on behalf of the European Union, Marcello Spatafora said that "it placed human rights at the centre of the framework of principles and obligations shaping relations within the international community."

Criticism

Islamic Criticism

Some Islamic countries have criticised the Universal Declaration of Human Rights for its perceived failure to take into the account the cultural and religious context of Islamic countries. In 1982, the Iranian representative to the United Nations, Said Rajaie-Khorassani, articulated the position of his country regarding the Universal Declaration of Human Rights, by saying that the UDHR was "a secular understanding of the Judeo-Christian tradition", which could not be implemented by Muslims without trespassing the Islamic law.

On 30 June 2000, Muslim nations that are members of the Organization of the Islamic Conference officially resolved to support the Cairo Declaration on Human Rights in Islam, an alternative document that says people have "freedom and right to a dignified life in accordance with the Islamic Shari'ah". However, this document does not guarantee freedom of

religion or gender equality, the root of many criticisms against its usage.

Education

Some proponents of alternative education, particularly unschooling, take issue with the right to compulsory education stated in Article 26. In the philosophies of John Holt and others, compulsory education itself violates the right of a person to follow their own interests:

> No human right, except the right to life itself, is more fundamental than this. A person's freedom of learning is part of his freedom of thought, even more basic than his freedom of speech. If we take from someone his right to decide what he will be curious about, we destroy his freedom of thought. We say, in effect, you must think not about what interests you and concerns you, but about what interests and concerns us.

Property Rights Criticism

Some libertarians have criticised the Declaration for its inclusion of positive rights that they believe must be provided by others through forceful extraction thereby negating others rights. Libertarian natural law theorist Frank Van Dun said of the document:

> The UD's distinctive "rights" are incompatible with that doctrine [of natural rights]. Enforcement of one person's economic, social, or cultural rights necessarily involves forcing others to relinquish their property, or to use it in a way prescribed by the enforcers. It would, therefore, constitute a clear violation of their natural right to manage and dispose of their lawful possessions without coercive or aggressive interference by others. It would also deny a person the right to improve his condition by accepting work for what he considers an adequate wage.

The Right to Refuse to Kill

Groups such as Amnesty International and War Resisters

International have advocated for "The Right to Refuse to Kill" to be added to the UDHR. War Resisters International has stated that the right to conscientious objection to military service is primarily derived from, but not yet explicit in, Article 18 of the UDHR: the right to freedom of thought, conscience and religion. Steps have been taken within the United Nations to make this right more explicit; but those steps have been limited to secondary, more "marginal" United Nations documents. That is why Amnesty International would like to have this right brought "out of the margins" and explicitly into the primary document, namely the UDHR itself.

> To the rights enshrined in the Universal Declaration of Human Rights one more might, with relevance, be added. It is "The Right to Refuse to Kill."

Bangkok Declaration

In the Bangkok Declaration adopted by Ministers of Asian states meeting in 1993 in the lead up to the World Conference on Human Rights, Asian governments reaffirmed their commitment to the principles of the United Nations Charter and the Universal Declaration of Human Rights. They stated their view of the interdependence and indivisibility of human rights and stressed the need for universality, objectivity and non-selectivity of human rights.

AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

The American Declaration of the Rights and Duties of Man was the world's first international human rights instrument of a general nature, predating the Universal Declaration of Human Rights by less than a year. The Declaration was adopted by the nations of the Americas at the Ninth International Conference of American States in Bogotá, Colombia, in April 1948, the same meeting that adopted the Charter of the Organization of American States and thereby created the OAS. The Declaration sets forth a catalogue of civil and political rights to be enjoyed by the citizens of the signatory nations, together with additional economic, social, and cultural rights due to them. As explained in the preamble:

> "The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty."

Although strictly speaking a declaration is not a legally binding treaty, the jurisprudence of both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights holds it to be a source of binding international obligations for the OAS's member states. While largely superseded in the current practice of the inter-American human rights system by the more elaborate provisions of the American Convention on Human Rights, the terms of the Declaration are still enforced with respect to those states that have not ratified the Convention, such as Cuba and the United States.

PARIS PRINCIPLES

The Paris Principles were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris on 7-9 October 1991. They were adopted by United Nations Human Rights Commission as Resolution 1992/54 of 1992 and Resolution 48/134 of 1993. The Paris Principles relate to the status and functioning of national institutions for the protection and promotion of human rights. In addition to exchanging views on existing arrangements, the workshop participants drew up a comprehensive series of recommendations on the role, composition, status and functions of national human rights instruments.

FIVE STIPULATIONS

The Paris Principles list a number of responsibilities for national institutions, which fall under five headings. *First*, the institution shall monitor any situation of violation of human rights which it decides to take up. *Second,* the institution shall be able to advise the Government, the Parliament and any other competent body on specific violations, on issues related to

legislation and general compliance and implementation with international human rights instruments. *Third*, the institution shall relate to regional and international organizations. *Fourth*, the institution shall have a mandate to educate and inform in the field of human rights.

Fifth, some institutions are given a quasi-judicial competence. "The key elements of the composition of a national institution are its independence and pluralism. In relation to the independence the only guidance in the Paris Principles is that the appointment of commissioners or other kinds of key personnel shall be given effect by an official Act, establishing the specific duration of the mandate, which may be renewable."

Chapter 11

International Migration and Human Rights

INTRODUCTION

Current migration flows have placed the issue of migration high on the international agenda. The magnitude and complexity of the phenomenon is such that international migration can no longer be considered peripheral to the mainstream of development policies. Today, every country is affected in some way by migration—either as country of origin, transit or destination, or sometimes a combination of these. In 2005, 191 million people, representing three per cent of the world population, resided outside the country of their birth. Almost one in every ten persons living in the more developed regions of the world is a migrant compared to one out of every seventy persons in the less developed regions.

Sixty per cent of all the world's migrants live in the more developed regions. The largest number of migrants live in Europe, followed by Asia and Northern America. Female migrants make up half of all international migrants. Female migrants outnumber male migrants in developed countries. Three-quarters of all international migrants are concentrated in only 28 countries and one in five international migrants lives in the United States of America. The almost 200 million persons living outside their country of birth are international migrants of one type or another—whether living abroad voluntarily or forced by circumstances beyond their control; whether seeking a better life or simply a different one; whether

legally admitted to residence or living a clandestine existence on the margins of society. And all–irrespective of their national origin, their race, creed or colour, or their legal status–share with the nationals of their host community both a common humanity and rights and responsibilities including the right to expect decent and humane treatment.

While for many the migration process is an empowering experience, the reality for some is one of exploitation and abuse, either limited to the migration journey or experienced while in the country of destination. Migrant women and children are particularly vulnerable to exploitation, and therefore require special attention to ensure that their human rights are respected. International migrants are a heterogeneous group. From highly skilled professionals to the young men and women who are smuggled across borders to work in sweat shops, they include people who have been in the country for decades and those who arrived only yesterday.

In many situations, migrants are integrated into the economy and society of the country in which they live, their rights are respected, and there are few obstacles to their ability to contribute economically, socially and culturally. In other situations, however, migrants' rights are less respected, and in order to lead secure and productive lives, they need human rights protection and are indeed entitled to it. It is often migrants with irregular status that are most in need of this protection.

Today, migration is at the forefront of political and legislative agendas in many countries and is also a topic of continued public debate at the international level. While this debate has centered either on the perceived challenges posed by migration, or on its contribution to development and poverty alleviation, the inextricable connection between migration, development and human rights has been insufficiently explored. The core principle of the international human rights regime is that human rights are universal, indivisible, inalienable, and interdependent. As set forth in the Universal Declaration of Human Rights, migrants are first and foremost human beings, included in the "everyone" of Article

2: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The principle of universality implies that States of origin, transit, and destination are all responsible for the protection of migrants’ human rights.

This year, the United Nations is commemorating the 60th Anniversary of the Universal Declaration of Human Rights. The Declaration embodies the fundamental universalist idea that all human beings have rights. The Convention Relating to the Status of Refugees was one of the first treaties concluded after the Universal Declaration of Human Rights was adopted. It is the key legal document defining the status of refugees, their rights and the legal obligations of States. The 1967 Protocol removed geographical and temporal restrictions from the Convention.

In 1990, the General Assembly adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. “The Convention opened a new stage in the history of efforts to establish the rights of migrant workers and to ensure that those rights are protected and respected.” In 2000, the United Nations General Assembly adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air, which entered into force in 2003 and 2004, respectively.

The Protocols supplemented the Convention against Transnational Organized Crime to prevent and combat trafficking in persons and smuggling of migrants, protect and assist the victims of human trafficking, and strengthen the cooperation among States. The importance of migration was furthermore raised at various United Nations conferences. In 1994, the International Conference on Population and Development in Cairo pointed to the need to address all root causes of migration, especially those related to poverty. It set as its objective the encouragement of more cooperation and

dialogue between countries of origin and destination in order to maximize the benefits of migration to those concerned and increase the likelihood that migration has positive consequences for the development of both sending and receiving countries. In 2001, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, was a landmark in the struggle to eradicate all forms of racism.

The Conference recognized that migration increased as a result of globalization, particularly from the South to the North, and stressed that policies towards migration should not be based on racism, racial discrimination, xenophobia and related intolerance. Furthermore, the Durban Conference called for a review, and where necessary, revision of any immigration policy inconsistent with international human rights instruments, with a focus on the elimination of all discriminatory policies and practices against migrants. The deprivation of the human right to development is one of the causes of migration itself.

The Universal Declaration of Human Rights states that "everyone as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." The necessity to integrate the analysis of migration and development policies is supported by the indivisible, universal and interdependent character of human rights—all human beings have human rights everywhere—for migrants, in their countries of origin, countries of transit and countries of destination.

A human rights approach which emphasizes State responsibility for the promotion of economic, social, cultural, civil and political rights ab initio may recast development policies in a way that would reduce emigration caused by the inability of States to ensure the exercise of nationals of their right to development. More work is needed to implement the goals of the 1986 United Nations Declaration on the Right to Development, "States have the right and the duty to formulate

appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals." The need to treat migration and development policies together has now been given global prominence by the Global Forum on Migration and Development (GFMD).

The Global Forum is an initiative of the international community to address the relation between migration and development in a practical and action-oriented way. The GFMD was proposed by the UN Secretary- General and his Special Representative on International Migration and Development at the High Level Dialogue on International Migration and Development on 14-15 September 2006 within the framework of the General Assembly of the United Nations. Its inaugural meeting was held in Brussels in July 2007 under the chairmanship of the Government of Belgium.

This year the Global Forum is being hosted in Manila by Government of the Philippines. International migration has tended to be seen primarily in development terms, as a response to disparities in income levels and as a means to create employment opportunities. Unemployment and poverty are often the 'push factors' which impel individuals to leave their home countries, while cross border differences in wage levels and labour demand are the 'pull factors' which direct them to more developed economies.

Migrants contribute to development in their home countries through remittances, and to their host countries through their work and cultural diversity, and—in some countries—to population growth and change in age structure. However, not enough attention has been paid to the role of human rights during the migration process or to the ways in which a lack of respect for the human rights of migrants in the countries of destination reduces their ability to contribute to development.

When migration is not also approached from this perspective, two difficulties arise: first—and self evidently—the protection of migrants is not given priority and secondly, where migration is seen only in economic terms, migrants may

come to be regarded more as commodities, rather than as individuals entitled to the full enjoyment of their human rights. Traditionally, both in countries of origin and in recipient States, such an approach has been largely underpinned by cost-benefit analyses. For instance, remittances have become an important source of income for many countries of origin, while many industries and service providers in host societies benefit from a migrant-based labour force.

There is general agreement that the beneficial effects of migration in terms of poverty reduction, development and wealth creation is higher than the human resources and financial costs spent by States to invest in new technologies to protect their borders and for the provision of social services. While this type of analysis is necessary, it is incomplete because it fails to take into account the right to human dignity of all migrants. It is often violence, social and economic exclusion, poverty, lack of access to basic services, inequality of opportunities, and multiple aspects of discrimination that force people to leave their communities and livelihoods.

Human dignity is also at stake in countries of destination when migrants are subject to violence, abuse and discrimination.. If countries of origin and destination are to reap the full development benefits of migration—not just counted in terms of volume of remittances and cheap labour, respectively, but also in terms of the linguistic and cultural value that migrants may bring—it is essential to address the social and human rights aspect of migration as well as the more obvious economic gains. International Migration and Human Rights.

Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights considers the human rights framework governing migration, arguing that migrants are not simply agents of development, but human beings with rights which States, exercising their sovereign right to determine who enters and remains in their territory, have an obligation to protect. Indeed, respecting and protecting the human rights of migrants enables them to contribute to development and share in its benefits; this

includes the development of migrants, their countries of origin and their host countries. The report seeks to provide States with guidance in order to promote lawful conditions of migration and manage it using a human rights-based approach. It is first and foremost the responsibility of governments to protect the human rights of migrants.

International human rights provisions can also be enforced in international and domestic courts in cases brought by individuals and public institutions (public defence, ombudspersons, etc.). However, no international human rights provision, or any other law is "selfenforcing". It is principally through the vigilance of civil society that violations of human rights are brought to light. Civil society organizations, including non-governmental organizations, labour unions, migrant associations, and religious bodies have an important role to play in the efforts to protect the human rights of all categories of migrants.

The introduction highlights the magnitude and complexity of current migration flows and points out the important role of human rights in the migration and development discourse.

DEFINITIONS

There is a lack of universally accepted definitions in the area of international migration. Definitions in this area are often vague, controversial or contradictory. This stems to some extent from the fact that migration is a phenomenon which has traditionally been addressed at the national level. Therefore the usage of migration terms differs from country to country. Furthermore, within a country, terms can vary in meaning or implication. Definitions may also vary just as to a given perspective or approach.

International Migrants

Irregular Migrants

An irregular migrant is every person who, owing to undocumented entry or the expiry of his or her visa, lacks legal status in a transit or host country. The term applies to migrants who infringe a country's admission rules and any

other person not authorized to remain in the host country (also called clandestine/ illegal/ undocumented migrant or migrant in an irregular situation).

Female Migrant

Women and girls who move from their country of origin in ever increasing numbers make up the ranks of female migration. Indeed, over the last five decades there has been a steady increase of female migration. Women now move around more independently and no longer solely in relation to their family position or under a man's authority.

Migrant Child

The category of migrant child refers to the person who is just as to the law of the relevant country, below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Unaccompanied migrant children can be defined as migrant children who migrate across national borders separately (though not necessarily divorced) from their families, and include within this definition four broad categories defined by the primary purpose of travel:

1. Children who travel in search of opportunities, whether educational or employment related;
2. Children who travel to survive—to escape persecution or war, family abuse, dire poverty;
3. Children who travel for family reunion—to join documented or undocumented family members who have already migrated;
4. Children who travel in the context of exploitation."

Migrant Worker

A documented migrant worker is a person who enters a State, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party.

> The term "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.

- The term “frontier worker” refers to a migrant worker who retains his or her habitual residence in a neighbouring State to which he or she normally returns every day or at least once a week.
- The term “seasonal worker” refers to a migrant worker whose work by its character is dependent on seasonal conditions and is performed only during part of the year.
- The term “seafarer”, which includes a fisherman, refers to a migrant worker employed on board a vessel registered in a State of which he or she is not a national.
- The term “worker on an offshore installation” refers to a migrant worker employed on an offshore installation that is under the jurisdiction of a State of which he or she is not a national.
- The term “itinerant worker” refers to a migrant worker who, having his or her habitual residence in one State, has to travel to another State or States for short periods, owing to the nature of his or her occupation.
- The term “project-tied worker” refers to a migrant worker admitted to a State of employment for a defined period to work solely on a specific project being carried out in that State by his or her employer.
- The term “specified-employment worker” refers to a migrant worker:
  - Who has been sent by his or her employer for a restricted and defined period of time to a State of employment to undertake a specific assignment or duty.
  - Who engages for a restricted and defined period of time in work that requires professional, commercial, technical or other highly specialized skill.
  - Who, upon the request of his or her employer in the State of employment, engages for a restricted and defined period of time in work whose nature is transitory or brief.

  - Who is required to depart from the State of employment either at the expiration of his or her authorized period of stay, or earlier if he or she no longer undertakes that specific assignment or duty or engages in that work.
- The term "self-employed worker" refers to a migrant worker who is engaged in a remunerated activity otherwise than under a contract of employment and who earns his or her living through this activity normally working alone or together with members of his or her family, and to any other migrant worker recognized as self-employed by applicable legislation of the State of employment or bilateral or multilateral agreements.

Environmental Migrant

An environmental migrant is characterized as a person who, for compelling reasons of sudden or progressive change in the environment that adversely affects his/her life or living conditions, is forced to leave his/her habitual home and cross a national border, or chooses to do so, either temporarily or permanently.

Environmental migrants may be distinguished between two categories:

- Environmentally motivated migrants are defined as those persons who "pre-empt the worst by leaving before environmental degradation results in devastation of their livelihoods and communities. These individuals may leave a deteriorating environment that could be rehabilitated with proper policy and effort." Their movement may be temporary or permanent.
- Environmental forced migrants are defined as those persons who "are avoiding the worst. These individuals have to leave due to a loss of livelihood, and their displacement is mainly permanent. Examples include displacement or migration due to sea level rise or loss of topsoil."

Refugee and Asylum Seeker

Refugee

The term refugee shall apply to any person who:

- Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization; Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfill the conditions of paragraph 2 of this section;
- As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

International refugee law and, more generally, the international refugee protection system provides for a specific regime of human rights protection for a specific category of persons: those who can no longer rely on their country of nationality or habitual residence for respect, protection and fulfilment of their human rights and fundamental freedoms. The working definitions of who has suffered persecution are

left to adjudication by national legal systems and can vary from country to country.

Asylum Seeker

An asylum seeker is a person seeking to be admitted into a country as a refugee and awaiting decision on his/her application for refugee status under relevant international and national instruments. Persons seeking asylum flee persecution based on race, religion, nationality, membership of a particular social group or political opinion, or political reasons, including conflict and war. In case of a negative decision, they must leave the country and may be expelled, as may any alien in an irregular situation, unless permission to stay is provided on humanitarian or other related grounds.

Types of Migration

Forced Migration

Forced migration is a general term to describe a migratory movement in which an element of coercion exists, including threats to life and livelihood, arising from natural or man-made causes, such as movements of refugees and internally displaced persons as well as people displaced by political instability, conflict, natural or environmental disasters, chemical or nuclear disasters, famine, or development projects.

Transit Migration

Transit migration refers to the regular or irregular movement of a person through any State on any journey to the State of employment or from the State of employment to the State of origin or the State of habitual residence.

Return Migration

Return migration refers to the “movement of a person returning to his/her country of origin or habitual residence usually after spending at least one year in another country. This return may or may not be voluntary. Return migration includes voluntary repatriation.”

Trafficking and Smuggling

While there are often overlaps of migration methods

between human trafficking and migrant smuggling, the key difference between the smuggling of migrants and human trafficking is the element of exploitation. This difference is clarified by the international definitions of trafficking and smuggling provided under the respective United Nations Protocols.

Those who are smuggled are left to their own devices at the point of destination whereas those who are trafficked remain under the control of their traffickers who continue to exploit them at the point of destination. Trafficking in persons and smuggling of migrants are distinct, but they represent overlapping issues. Their legal definitions contain common elements. Actual cases may involve elements of both crimes or they may shift from one to the other. Many victims of human trafficking begin their journey by consenting to be smuggled from one State to another. Smuggled migrants may later be tricked or coerced into exploitive situations and thus become victims of human trafficking.

Trafficking in Persons

Trafficking in persons is a crime against a person that involves the abuse of his/her human rights through exploitation. Human trafficking can also involve legal migration methods between States. It can occur internally within countries and does not necessarily have to be transnational in nature. Alternatively, human trafficking can involve the kidnapping or abduction of a person who is then consequently subjected to forced migration.

Human trafficking often involves a number of additional offences against the trafficked persons that are also in violation of human rights, for example, rape, physical abuse or unlawful confinement. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children defines human trafficking under Article 3 (a) as follows:

"Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion,

of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

Smuggling of Migrants

Smuggling of migrants refers to assisting a person who is not a national or permanent resident to enter and remain in a State without complying with the necessary requirements for legally entering and remaining in the State. In addition to smuggling *per se*, the Smuggling of Migrants Protocol also covers the offence of enabling illegal residence.

The intention in establishing this offence is to include cases where the entry of migrants is through legal means, such as visitors' permits or visas, but the stay is through resorting to illegal means. In response to improved border control measures, the number of irregular migrants who turn to the services of smugglers to migrate has risen significantly. In order to maximize their profits, it is increasingly the case that smugglers knowingly offer migration services that are more risky in order to lower transport and facilitation of entry costs and increase the cost of smuggling. Smuggling of migrants is always transnational in nature. The United Nations Protocol on the Smuggling of Migrants by Land, Sea and Air defines migrant smuggling under Article 3(a) as follows:

"Smuggling of migrants shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."

Key Migration-Related Terms

Immigrant

An immigrant is a person belonging to, or owing an

allegiance to, one State and moving into another State for the purpose of settlement.

National

The term national equals the term citizen and refers to a person, who, "either by birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil and political rights and protection; a member of the State, entitled to all its privileges; a person enjoying a nationality of a given State." The term non-national includes temporary foreign workers, refugees, successful and unsuccessful asylum-seekers, trafficked persons and undocumented individuals. The category also encompasses stateless persons, those people who have never acquired citizenship of the country of their birth, have lost their citizenship and have no claim to citizenship of another State, children born in States that recognize only the jus sanguinis principle of citizenship; and children born in a State to non-nationals who inherit their parents' statelessness.

Non-Refoulement

The 1951 Convention Relating to the Status of Refugees laid down the principle of non-refoulement just as to which "no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." This principle cannot be "claimed by a refugee, whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." "The concept of nonrefoulement also includes the prohibition of any form of forcible removal, whether direct or indirect, to a threat to torture, cruel, inhuman or degrading treatment or punishment."

Detention of Migrants

In this report the term detention is used to indicate both

administrative deprivation of liberty, or remand custody, and incarceration or imprisonment resulting from criminal charges or sentencing.

THE LEGAL FRAMEWORK

Respect for the human rights of all migrants is a fundamental duty of all States and must underly all policies and practices with respect to their treatment by public authorities in all situations. Laws, policies and practices in the country of origin, transit and destination all impact on the protection of the human rights of migrants. The protection of migrants is a key issue in the current era of globalization. Indeed, as it is becoming increasingly obvious that economic globalization also implies increased human mobility, the protection of people on the move needs to be revisited to address new challenges.

Migrant labour is now vital to many developed as well as less developed economies, while migrants' remittances have become the lifeline for numerous households in countries of origin. The economic importance of migration calls for appropriate measures to address its human dimension, including notably migrants' rights and responsibilities. A range of human rights instruments exists at the international level promoting the human rights of all migrants, including specific instruments on the protection of women and children that apply equally to migrant women and children. While governments have broad sovereign powers in determining nationality, admission, conditions of stay and removal of non-nationals, once a non-national is in the territory of a State, the State must respect and ensure the human rights of "all individuals within its territory and subject to its jurisdiction... without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Prima facie, therefore, the rights contained in these instruments are guaranteed to all persons present in a State: nationals and non-nationals alike, regardless of legal status, gender or age. International human rights instruments

constitute a legal framework for the protection of all migrants. The status of irregular migrants should not be used as justification for the violation of their rights.

Over the last few decades, as more States have agreed to binding international human rights treaties, a major change has taken place in the way in which the rights of non-nationals are protected. This has involved a shift beyond the classic system of diplomatic and consular protection by the migrants' State of nationality, towards the direct protection of the individual under international human rights norms. While States may expel or remove migrants who are illegally on their territory, international human rights law is clear in its requirement that the State should generally protect their rights without discrimination for as long as they remain on its territory, irrespective of their immigration status.

Expulsion must not breach international law and human rights may be relevant in the determination of the lawfulness of an expulsion. At the centre of all human rights treaties is the prohibition of discrimination, which prescribes equal protection to nationals and non-nationals alike. The fundamental rights protections contained in the two International Covenants; the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICES CR), and in the conventions prohibiting racial discrimination (International Convention on the Elimination of All Forms of Racial Discrimination, ICERD), protecting the rights of children (Convention on the Rights of the Child, CRC), prohibiting discrimination against women (Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW), prohibiting torture (Convention Against Torture, CAT), and prohibiting discrimination against disabled persons (Convention on the Rights of Persons with Disabilities, CRPD), apply universally to nationals and to all migrants, regardless of their immigration status.

Thus the International Covenant on Civil and Political Rights (ICCPR) protects the rights of 'all individuals within its territory and subject to its jurisdiction' without distinction; it

guarantees to all persons equality before the law and equal protection by the law without any discrimination. The Human Rights Committee has set out the general rule—with narrow exceptions—that each of the rights under the Covenant must be guaranteed without discrimination between nationals and non-nationals.

It has noted that the Covenant does not recognize the right of non-nationals to enter or reside in a State's territory; that consent for entry may be given subject to conditions relating, for example, to movement, residence and employment; and that a State may also impose general conditions upon a non-national who is in transit.

However, once within the territory of a State, non-nationals are entitled to the rights set out in the Covenant. The Committee has been explicit that enjoyment of these rights is not limited to nationals: "but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party." Similarly, in its 2004 General Recommendation on Discrimination against Non-Citizens, the Committee on the Elimination of Racial Discrimination (CERD) urged States to ensure that legislative guarantees against racial discrimination "apply to non-citizens regardless of their immigration status."

The International Convention for the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) applies the human rights contained in the general human rights instruments to the specific situation of migrant workers and members of their families and in addition requires States to collaborate in combating irregular migration.

Under the Convention, States are required to:

- Take measures against the dissemination of misleading information,
- Detect and eradicate irregular movement of migrants, and
- Impose effective sanctions on those who organize and operate such movements.

The creation of the post of the Special Rapporteur on the Human Rights of Migrants by the United Nations was an effort to "examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants, including obstacles and difficulties for the return of migrants who are undocumented or in an irregular situation."

The mandate of the Special Rapporteur was created in 1999 by the Commission on Human Rights, pursuant to Resolution 1999/44. Among the main functions of the Special Rapporteur are to take into account a gender perspective when requesting and analyzing information, as well as to give special attention to the occurrence of multiple discrimination and violence against migrant women. Ms. Gabriela Rodríguez Pizarro from Costa Rica served as Special Rapporteur from 1999 to 2005. Since 2005 Mr. Jorge A. Bustamante from Mexico holds this position.

The Special Rapporteur of the Subcommission on the Promotion and Protection of Human Rights, Mr. David Weissbrodt, prepared a final report on the rights of non-citizens, which provides a synthesis of the general principles of and specific exceptions to the rights of non-citizens under international human rights law together with a brief identification of some of the areas in which these rights are not being respected. The report concludes that there is a large gap between the rights that international human rights law guarantee to non-nationals and the realities they must face. In many countries there are institutional and endemic problems confronting non-nationals. A review of international migration law reveals an impressive machinery of instruments defining and protecting the human rights of migrants.

There is no need for further instruments, but there is a need to intensify efforts across the board to ensure that the human rights commitments States have entered into at the international level are effectively put into practice. In the multi-faceted migration and development equation, it is vital to strengthen the role and action of human rights instruments and mechanisms in protecting the human rights of migrants and in addressing their vulnerability, especially in consideration

of the most vulnerable groups of migrants including children, women and irregular migrants. This should proceed in parallel with educating duty bearers about their obligations and responsibilities to protect migrants.

Promotion of Lawful Conditions of Migration

The shared responsibility of States to protect the human rights of migrants is reflected in Part VI of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), entitled "Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families". It provides concrete guidance for the consultation and cooperation among States in order to develop migration policies that are consistent with human rights norms.

It is essential that States maintain appropriate services to deal with issues of international migration. Such services should formulate and implement migration policies as well as exchange information, consult and cooperate with the competent authorities of other States. They should also be responsible for providing appropriate information on policies, laws and regulations relating to migration and employment and on agreements with other States in this field. Finally, these services should be in charge of providing assistance to migrants regarding authorizations and formalities in preparation for their orderly migration. The provision of information is especially important in the case of prospective female migrants who have less access to adequate information about legal channels of migration. Being equipped with insufficient information gives women less chance of migrating legally and therefore forces them to migrate clandestinely. When legal channels are not available, many women see trafficking or smuggling as the only option to cross the border. This places them at increased risk of exploitation and abuse. Women are among the most vulnerable throughout the migration process.

The provision of reliable information is crucial for the promotion of lawful conditions of migration. In fact, lack of

information may often cause migrants to unwittingly break laws and regulations, or may lead them to leave their country of origin without proper preparation, rendering their life in the country of destination more difficult. Provision of information about lawful conditions of migration should go hand in hand with appropriate measures against the dissemination of misleading information, such as that provided by smugglers and traffickers. Countries of origin, transit and destination should increase their efforts to eradicate smuggling and trafficking of migrants that cause the death of hundreds of people every year and trauma for thousands more. This phenomenon can only be combated through close cooperation of all countries concerned.

Effective sanctions should be imposed on persons and groups which organize the smuggling and trafficking of migrants, while recognizing the needs for protection of the victims of these crimes. Victims of trafficking should be dealt with in full compliance with the Office of the High Commissioner for Human Rights (OHCHR) Recommended Principles and Guidelines on Human Rights and Human Trafficking. States must also take the requisite measures, legislative or otherwise, to reduce to the fullest extent possible the number of workers outside the formal economy, workers who as a result of that situation have no protection. Migrants in an irregular situation are among the most vulnerable persons in any society and are not in a position to defend themselves against exploitation by their employers. Many female migrants are found in the informal sector of the economy, which points to a transnational labour market composed of networks of women who work as housekeepers, personal caretakers, street vendors, waitresses and bartenders, among other activities. Working without adequate protection makes women more vulnerable to exploitation and human rights abuses, including low wages, illegal withholding of wages, and illegal and premature termination of employment. Women are often found in gender-segregated and unregulated sectors of the economy which are typically unprotected by local labour legislation.

The plight of migrant domestic workers merits special attention, as their human rights are least protected. Countries of destination should therefore make it their priority to ensure that the basic rights of irregular migrants or those in the informal economy are protected, including their right to equal treatment with respect to remuneration and conditions of work. As reflected in the preamble of the Migrant Workers' Convention (ICRMW), the enforcement of equality of treatment of irregular migrant workers will remove the incentive for employers to have recourse to their services. Migrants search for work in countries where the labour market is in need of their services. Efforts to end employment of workers in an irregular situation should thus go hand in hand with opening up channels for lawful migration in order to meet the local labour demand.

Cooperation among countries of origin and countries of destination can prove very helpful in this respect, both for discouraging irregular migration and for encouraging applications for lawful migration. Strict supervision of recruitment operations in countries of origin is also an important tool in preventing unlawful practices, including trafficking. Guidance can be found in Article 66 of the Migrant Workers Convention (ICRMW), which restricts the right to undertake operations for the recruitment of migrant workers to the public services of the country of origin, or, if a bilateral agreement exists, the public services of the country of employment. A public recruitment body may also be established by virtue of a bilateral or multilateral agreement between countries. As far as private agencies or employers are concerned, they should only be allowed to recruit migrant workers if they have obtained the requisite authorization by the public authorities of the countries concerned and under their supervision.

Female Migrants

Although differences exist regarding the sex distribution among the various regions in the world, women comprise nearly half of all migrants today, approximately 94.5 million

or 49.6 per cent of the 190.6 million persons worldwide living outside their countries of origin in 2005. Female migrants account for 52.2 per cent of all migrants in the developed countries and constitute 45.7 per cent of all international migrants in developing countries. A number of human rights instruments exist to protect the rights of women and girls who migrate.

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) addresses the rights of migrant workers and their family members in both regular and irregular situations during the entire migration process: departure, transit, destination and return, and provides useful guidance for States on how to ensure that migration is managed humanely.

The complementary ILO Convention 97 on Migration for Employment provides specific standards regarding female migrant worker employment and occupation. The Convention for Suppression of the Traffic in Women and Children provides protection for women seeking employment in another country. Regulations require the protection of migrant women not only at the points of departure and arrival, but also during the journey. Among other international mechanisms relevant to female migrants is the Protocol of Palermo including the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime requiring States to take measures to promote the rights of female migrants.

Standards for protecting female migrants' rights are also found in the Programme of Action of the International Conference on Population and Development, the Beijing Declaration and Platform for Action, and General Assembly Resolution 58/143 on Violence against Women Migrant Workers. A number of protection mechanisms deriving from

the United Nations Charter are relevant to promoting the rights of migrant women as well. The mandate of the Special Rapporteur, established by the Human Rights Council, is one such mechanism. Of particular relevance for female migrants are the Special Rapporteurs on (a) Violence against Women; (b) Trafficking in Persons, especially Women and Children; and (c) the Human Rights of Migrants. The Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, reiterated the need for a comprehensive approach to female migrants' human rights in order to ensure that women and girls who migrate had a framework for protection and enjoyed rights appropriate and adequate to their particular vulnerable situations.

The ICPD Programme of Action specifically referred to the objective of eliminating discriminatory practices against documented migrants, especially women, children and the elderly. It stated that women and children who migrate as family members should be protected from abuse and denial of their human rights by their sponsors, and urged governments to consider extending their stay, within limits of national legislation, should the family relationship dissolve.

The Beijing Platform for Action called for, inter alia, the provision of gender-sensitive human rights education and training for public officials, including police and military personnel, corrections officers, health and medical personnel, and social workers, including people who deal with migration and refugee issues.

It urged governments to "promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes related to violence against women and actively encourage, support and implement measures and programmes aimed at increasing the knowledge and understanding of the causes, consequences and mechanisms of violence against women among those responsible for implementing these policies, such as law enforcement officers, police personnel and judicial, medical and social workers, as well as those who deal with minority, migration and refugee issues, and develop strategies to ensure that the revictimization

of women victims of violence does not occur because of gender-insensitive laws or judicial or enforcement practices."

Migrant Children

The Convention on the Rights of the Child (CRC) defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". Whether on their own or in company with adults (family or non-family), children as migrants move across borders in search of survival, security, education, improved standards of living and protection from abuse. The CRC and its Optional Protocols are an effective point of reference for all children affected by migration, regardless of their migration status.

International human rights instruments on migration, such as the International Convention on the Rights of All Migrant Workers and Members of their Families and the ILO Conventions, also provide comprehensive guidance on ensuring the rights of migrant children. The ICRMW provides for the rights of migrant children, regardless of their immigration status, to have a name, to registration of birth and to a nationality.

It also provides the basic right of access to education on the basis of equality of treatment with nationals of the State concerned and provides expressly that such access shall not be refused or limited by reason of the irregularity of the child's stay in the country. The Committee on the Rights of the Child, a body of independent experts that monitors the implementation of the Convention on the Rights of the Child, advises that a State which ratifies the Convention on the Rights of the Child, takes on obligations under international law "to ensure the realization of all rights in the Convention for all children in their jurisdiction."

In its general comment No. 6, the Committee stated: "the enjoyment of rights stipulated in the Convention is not limited to children who are nationals of a State Party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children—including asylum—seeking,

refugee and migrant children—irrespective of their nationality, immigration status or statelessness."

Four fundamental principles of the CRC provide a basis for all actions that States may take to respect, protect, promote and fulfill the rights of children:

1. *Non-Discrimination*: CRC Article 2 states, among other things, that children should not be discriminated because of their nationality, ethnic origin or other status.
2. *Best Interests of the Child*: CRC Article 3 states that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." This implies, regarding migrant children, that programmes and services (health, education, etc.) should be provided on the basis of children's best interests with no relevance to the status of their documentation. The best interests of the child must also be the key concern whenever decisions are made on repatriation measures to countries of origin.
3. *Life, Survival and Development*: The right to survival is related to the right to an adequate standard of living, the highest attainable standard of health, nutritious food and clean drinking water. The right to development includes systems of formal education as well as community and informal structures which provide opportunities for children to participate in a range of cultural and social activities. CRC Article 27 states that States Parties should take appropriate measures to assist parents and others responsible for the child to implement the right of adequate living and to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child. Furthermore, vital to survival and development of the child is CRC Article 19 protecting the child from violence and exploitation.

4. *The Right of the Child to be Heard and Participate*: Children have the fundamental right to formulate and express opinions about all matters that affect them. The CRC establishes the principle that children's views should be heard and given due attention, taking into account "the age and maturity of the child." Therefore experiences of migrant children should inform decisions about the ways in which their rights will be respected. This right to be heard must be fully respected and satisfied in both administrative and judicial procedures related to their migration status. States Parties have a clear and precise obligation to assure the children's right to a say in situations that may affect them.

Legislative reform can support a comprehensive and rights based approach that fulfils the socio-economic and other fundamental rights of all migrant children, regardless of their nationality or migration status. All policy and legal initiatives dealing with the effects of migration on children need to focus on drawing up new sets of rules and regulations to address migration concerns and to protect the best interests of the child. In many countries, human rights instruments, including the CRC and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) have been "successfully incorporated into diverse legal systems. This process of alignment of national legislation with human rights instruments, with the CRC in particular, is important as it underlies principles such as the indivisibility of rights and the importance of partnerships in realizing children's rights."

These rights include the basic requirements for family support, access to social services (including education and health care), protection of children in conflict with the law and specific matters, such as protection from harmful traditional practices, freedom to cross borders to reunite with parents and access to information they need to make decisions about their own lives. This principle should be a primary consideration in making choices between differences presented by migrant communities and the integration of migrants into

the receiving culture, such as facilitating preservation of some cultural traditions that strengthen their sense of identity.

The best interests of the child should also influence decisions on deportation of undocumented adult migrants or migrants who fail to comply with restrictions on work authorization. The Working Group on Arbitrary Detention is of the opinion that unaccompanied juvenile irregular migrants should not be detained under immigration powers (whether for reasons of establishing their identity, facilitating their removal to their country of origin, preventing them from absconding or other such grounds usually put forward by States) at all, as such detention would not be lawful under the limitations provided for by article 37 (b) CRC, notably being a measure of last resort.

As the Committee on the Rights of the Child has asserted, "In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof." Furthermore, Article 24 of Paragraph 1 of the International Covenant on Civil and Political Rights (ICCPR) states that every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to measures of protection, required by his status of minor, on the part of his family, society and the State. The International Convention for the Suppression of the Traffic in Women and Children provides protection for migrant children of both sexes in another country. The Convention requires States to provide protection for migrant children during the entire migration process in the country of origin, transit and destination.

Migrant Workers

The Fundamental Rights of Migrant Workers

Labour rights provided for in all international labour conventions apply to migrant workers. In particular, Member States have an obligation to respect, promote and realise, in

good faith and in accordance with the International Labour Organization (ILO) Constitution, the principles concerning the rights stipulated in the fundamental conventions. This obligation derives from membership in the ILO and from the endorsement by Member States of the principles set out in the Constitution and in the Declaration of Philadelphia.

The 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up is clear in this respect. The Fundamental Principles and Rights at Work are grouped into four sets: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. Each set corresponds to two fundamental labour conventions. All migrant workers, regardless of their status, should enjoy these rights.

Freedom of Association and the Effective Recognition of the Right to Collective Bargaining

Freedom of association and the right to collective bargaining both empower migrant workers and enable them to better access other human rights. By exercising these rights, workers can participate in the development of national and international economic policies as well as policies in the workplace. Recognizing the right of migrant workers to organize and participate in collective bargaining will increase the effectiveness of such policies.

The Elimination of All Forms of Forced or Compulsory Labour

The abolition of forced labour is essential to the protection of fundamental freedoms and is related to income and human capital formation, which are likely to be depressed by forced labour.

Trafficking of human beings is one of the manifestations of forced labour in international migration. The exploitation it entails turns migration into a negative experience for migrant workers as well as for countries of origin and destination.

Confiscation of travel documents also leads to forced labour situations.

The Effective Abolition of Child Labour

An increasing number of unaccompanied children are crossing international borders to work, which makes the elimination of child labour particularly important. Child labour adversely affects the present and future lives of working boys and girls by affecting their health and depriving them of education. Precluding human capital formation, child labour is also detrimental to development in the children's countries.

The Elimination of Discrimination in Respect of Employment and Occupation

Equality and non-discrimination are basic principles underlying human and labour rights. In a world of Nation-States where rights derive from citizenship, these principles are of utmost importance for the protection of workers who are outside their countries of origin. Treating migrant workers with equality and non-discrimination has a positive impact upon migrant workers' countries of origin and destination. It enables workers to reach their full working potential, enhance their earnings, improve their living conditions (and the living conditions of their families), contribute to development in their countries of origin and increase their participation in the economy of the countries of destination.

The Protection of the Specific Rights of Migrant Workers

Discharging its constitutional obligation to protect the rights of workers employed in countries other than their own, the ILO has adopted two international labour conventions specific to the subject. Even though focused on protection, the two conventions also include provisions relevant to development in countries of origin. In the review, reference will be made to the 1990 International Convention on the Rights of All Migrant Workers and Members of their Families, which has built upon the ILO conventions.

The ILO has also recently adopted a non-binding text,

the ILO Multilateral Framework on Labour Migration. Going further than the conventions, the Framework brings together aspects of protection of migrant workers with those relating to the contribution of labour migration to development. The main provisions of the Framework will also be reviewed.

The Labour Rights Framework

The Migration for Employment (Revised) Convention, 1949 (No. 97), and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), as well as their accompanying Recommendations, provide a framework for the basic components of a comprehensive labour migration policy, the protection of migrant workers, the development of their potentials and measures to facilitate as well as to control migratory movements.

They also provide minimum standards of protection for all migrant workers. More specifically, these instruments call for measures aimed at regulating the conditions in which migration for employment occurs, controlling irregular migration and labour trafficking and detecting the informal employment of migrants, with the aim of preventing and eliminating abuses.

The concept of the rights of irregular migrant workers was inspired not only by the basic principle of respect for the dignity of all human beings, but also by the desire to discourage recourse by employers of irregular migrants, by making such recruitment less economically beneficial. In addition, the two conventions call for measures related to the maintenance of free services to assist migrants and to the provision of information, steps against misleading propaganda and the transfer of earnings.

They define parameters for recruitment and contract conditions, and for appeals against unjustified termination of employment or expulsion. The two instruments further include provisions on the participation of migrants in job training, on their promotion as well as on family reunification. Most importantly, the two instruments call for the adoption of a policy to promote equality of treatment and opportunity

between migrants in regular situations and nationals in employment and occupation in the areas of access to employment, remuneration, social security, trade union rights, cultural rights and individual freedoms, employment taxes and access to legal proceedings.

Article 6 of Convention No. 97 on Migration for Employment provides for equality of treatment in respect, inter alia, of:

- Remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holiday with pay, restrictions on home work, minimum age for employment, apprenticeship and training;
- Accommodation;
- Social security (legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency, which is covered by a social security scheme), subject to specific limitations provided for by appropriate arrangements, national laws or regulations; and
- Employment taxes, dues or contributions payable in respect of the person employed.

Part II of Convention No. 143 applies to regular migrant workers and provides for equality of opportunity and treatment with national workers. While Convention No. 97 also provides for equality of treatment, only Convention No. 143, concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, expands this to include equal opportunity. In relation to access to employment, Part II of this Convention permits States to restrict the principle of equality of treatment in certain circumstances. States can, for example, restrict access to limited categories of employment or functions where this is necessary in the interests of the State and can also make the free choice of employment subject to temporary restrictions during a prescribed period, which may not exceed two years.

Neither Convention No. 97 nor 143 extends equality of

treatment to migrant workers in irregular status. It is noteworthy that the two conventions, especially Convention No. 143, have incorporated the principles of the fundamental Discrimination (Employment and Occupation) Convention, 1958, prohibiting discrimination against migrant workers on the basis of race, colour, sex, religion, national extraction, political opinion and social origin. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) is a fundamental element for the protection of the human rights of migrants since it applies to all aspects of the life of migrants including the migrant's family and the situation of women and children, and explicitly recognizes the rights of undocumented migrants.

Another positive element of the Convention is its broad vision of rights; although it is intended to regulate the rights of workers, it is not limited to the employment context but regulates the entire spectrum of workers' rights. The Convention articulates even more broadly the principle of equality of treatment between migrant workers and nationals before courts and tribunals, with respect to remuneration and other working conditions, as well as with regard to migrant workers' access to urgent medical assistance and education for their children. In the Migrant Workers' Convention (ICRMW), equality and nondiscrimination extend to migrant workers in irregular situations, in accordance with national laws.

Thus, the ICRMW does not depart substantively from the fundamental rights protected in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICES CR), and other universal human rights treaties, but it does articulate these rights in ways which take into account the particular situation of migrant workers and their families. It seeks to establish basic principles for their treatment and to establish norms which will contribute to the harmonization of States' attitudes towards migration through acceptance of these basic principles. It also requires action by States to 'prevent and eliminate clandestine movements and trafficking', and to

'eliminate' the employment of irregular migrants by employers.

The ICRMW first sets out the rights to be enjoyed by all migrant workers, regardless of their immigration status. It states explicitly that the enjoyment of these rights does not imply any right to regularization of the situation of undocumented migrants.

These protected rights include: the right to leave any country and to return to one's country of origin; the right to life; prohibition of torture; prohibition of inhuman or degrading treatment; prohibition of slavery and forced labour; freedom of opinion and expression; freedom of thought, conscience and religion; right to join a trade union; prohibition of arbitrary or unlawful interference with privacy, home, correspondence and other communications; prohibition of arbitrary deprivation of property; the right to liberty and security of persons; safeguards against arbitrary arrest and detention; recognition as a person before the law; right to procedural guarantees; prohibition of imprisonment, deprivation of authorization of residence and/or work permit and expulsion merely on the ground of failure to fulfill a contractual obligation; protection from confiscation and/or destruction of identification card and other documents; protection against collective expulsion; right to recourse to consular or diplomatic protection; principle of equality of treatment in respect of remuneration and other conditions of work, terms of employment and social security; right to receive urgent medical care; right of a child of a migrant worker to a name, registration of birth and nationality and to access to education on the basis of equality of treatment; respect for the cultural identity of migrant workers and members of their families; right to transfer to the State of origin earnings, savings and personal belongings; and right to be informed on the rights arising from the Convention and dissemination of information.

Often these rights are articulated in terms which reflect the specific circumstances of migrants. Thus, where a migrant worker is deprived of his liberty, the State must 'pay attention to the problems that may be posed to his family'. The Convention makes unauthorized confiscation of documents an offense, and gives migrant workers the right to information

about their conditions of admission. The Convention then provides additional rights to regular migrant workers: for example, to be 'temporarily absent' from the State of employment without effect upon their authorization to stay or work, to freedom of movement, and to equality of access to education, housing, social and health services.

It also provides for protection of the unity of the families of migrant workers and for the facilitation of family reunification and for a right to transfer earnings and savings—remittances—to their home countries. In its last substantive part, the Convention sets out a framework for promoting 'sound, equitable, humane and lawful' conditions for the management of international migration. This includes consultation and cooperation between States; policy making and exchange of information; the 'orderly return' of migrants at the end of their contracts or where they are irregular; collaboration to prevent and eliminate illegal or clandestine movements, and the employment of irregular workers.

Finally, non-discrimination and equality of treatment are cornerstones of the widely ratified International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICES CR). Together with international labour standards, human rights norms, in particular those contained in the ICES CR, also protect employment rights, including the right to 'just and favourable conditions of work', non discrimination, fair wages, safe and healthy working conditions, and reasonable working hours.

Work must be 'decent work', which respects the rights of workers in terms of conditions of work safety and remuneration, and provides an income allowing workers to support themselves and their families. Article 14 of the Migrant Worker (Supplementary Provisions) Convention No. 143 provides for the right of regular migrant workers to geographical mobility and for recognition of occupational qualifications acquired outside the territory of the State Party, including certificates and diplomas. The ILO Multilateral Framework on Labour Migration comprises non-binding principles and guidelines for a rights-based approach to labour

migration. It is a guide for the formulation of labour migration policies that guarantee the rights of migrant workers, reinforcing their protection and enhancing their contribution to development. Principles 8 and 9 are dedicated to the protection of migrant workers. Principle 8 stipulates that the human rights of migrant workers, regardless of their status, should be promoted and protected. This principle refers to the ILO 1998 Declaration and to the relevant human rights instruments adopted in the context of the United Nations.

Principle 9 states that all international labour standards apply to migrant workers, that protection requires a sound legal foundation based on international law and that national migration laws and policies should be guided by ILO standards in the areas of employment, labour inspection, social security, maternity protection, protection of wages, occupational safety and health, as well as in such sectors as agriculture, construction and hotels and restaurants. A separate principle is dedicated to prevention and protection against abusive migration practices such as smuggling and trafficking. The same principle calls on governments to work towards preventing irregular labour migration.

Protection of Migrant Workers from Abuses by Private Employers

States' duties under international law are not limited to respecting, protecting, and fulfilling human rights through the acts of State institutions and officials. States are also obliged to protect individuals against violations by private persons. This is of great importance to migrants, since many migrants work for private employers, in the informal economy and in domestic work. These who are employed in private households tend to be isolated with no supporting networks. Domestic work is often undervalued as informal work and not recognized under labour law or labour codes.

As a result, most domestic workers have not been able to enjoy the fundamental rights that they are entitled to. States must take positive measures to ensure that private persons or entities do not, for example, inflict cruel, inhuman or degrading

treatment or punishment on others within their power. They must also protect individuals from discrimination by the private sector in relation to work or housing. States must take measures to protect migrant women and children from 'slavery disguised as domestic or other kinds of personal service.' States must also take steps to regulate working conditions in the informal economy, including domestic and agricultural work, and must monitor compliance by private sector employers with legislation on working conditions through an effectively functioning labour inspectorate.

Refugees

Refugee law is an integral part of human rights. The Convention on the Status of Refugees was one of the first treaties enacted after the Universal Declaration of Human Rights was adopted, due to the centrality of the refugee problem in the entire concept of international human rights in the post-war period. At first sight it should seem implicit enough that refugee protection is fundamentally part of human rights. Yet, this is a relationship that is not well understood. In some quarters, the very kinship between the refugee protection regime and that of human rights is even contended. Refugee protection is human rights protection. The institution of asylum "derives directly from the right to seek and enjoy asylum set out in Article 14(1) of the 1948 Universal Declaration of Human Rights." International refugee law and, more generally, the international refugee protection system provides for a specific regime of human rights protection for a specific category of persons: those who can no longer rely on their country of nationality or habitual residence for respect, protection and fulfilment of their human rights and fundamental freedoms. International refugee law is thus embedded within human rights law. Central to the realization of the right to seek asylum is the principle of non-refoulement.

The principle of non-refoulement embodied in Article 33 of the Convention Relating to the Status of Refugees encompasses any measure attributable to the State which could have the effect of returning an asylum seeker or refugee to the

frontiers of territories where his/her life or freedom would be threatened, or where he or she is at risk of persecution, including interception, rejection at the frontier or indirect refoulement.

This prohibits any form of forcible removal, whether direct or indirect, to a threat to life or freedom or to torture, cruel, inhuman or degrading treatment or punishment. It includes deportation, expulsion, extradition, "rendition" and non-admission at the border.

Many asylum-seekers and even refugees continue to be deported as illegal migrants as part of migration control measures. Asylum-seekers are particularly vulnerable to deportation if detained. The 1951 Convention Relating to the Status of Refugees is the key legal document in defining who is a refugee, his/her rights and the legal obligations of States.

The Preamble to the 1951 Convention summarizes the objectives of international protection:

> "To assure refugees the widest possible exercise of...fundamental human rights and freedoms" which all "human beings [should] enjoy...without discrimination as to race, religion or country of origin." The contracting States agreed to treat refugees within their territories at least as favourably as States treat their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children.

The 1967 Protocol Relating to the Status of Refugees removed geographical and temporal restrictions from the Convention. By accession to the Protocol, States undertake to apply the substantive provisions of the 1951 Convention to all refugees covered by the definition of the latter, but without limitation of date. "Although related to the Convention in this way, the Protocol is an independent instrument, accession to which is not limited to States Parties to the Convention. The Convention and the Protocol are the principal international instruments established for the protection of refugees and their basic character has been widely recognized internationally." International protection is thus premised on human rights

principles. The different human rights instruments, mechanisms and procedures complement international refugee law tools.

Smuggled Migrants and Victims of Trafficking

The United Nations Convention against Transnational Organized Crime and its Protocols on Trafficking in Persons and Smuggling of Migrants are indispensable instruments for the waging of a coordinated fight against these activities. It is essential that the differences between the smuggling of migrants and trafficking in persons are understood before an effective policy response to both crimes can be developed and implemented. While both human trafficking and migrant smuggling prey on the vulnerabilities of people and their desires to migrate, they are ultimately two distinct crimes.

The UN Trafficking Protocol is the first international instrument to identify trafficked persons as victims of crime. In doing so, it supports the implementation of national measures that recognise and respond to their status as victims of crime including providing victims with information on court proceedings, protecting their identity during the criminal justice process, and providing access to protection and support services. The Protocol on the Smuggling of Migrants by Land, Sea and Air seeks to prevent and combat the smuggling of migrants.

Although there has been increased attention and action on the part of many countries regarding the issue and responses to trafficking in persons and the smuggling of migrants, there remains a considerable number of countries where specific legislation on human trafficking and migrant smuggling is lacking, or where only certain elements of the Trafficking and Smuggling Protocols are being addressed. Many States lack the capacity and expertise to implement legislation in line with the Protocols. The Trafficking Protocol has been ratified by many States, signaling their commitment to combat human trafficking under national legislation; however it is often the case that the comprehensive approach to human trafficking embodied by the Protocol is not fully implemented within

national responses to human trafficking. The criminalization of human trafficking is often well developed, but such criminalization requires the support of measures for the protection of trafficked victims under national legislation in order for it to be most effective. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, in its part VI, also obliges States to collaborate with the view to preventing and eliminating illegal or clandestine movements of migrants, and to take measures to detect and eradicate such movements and to impose effective sanctions on persons, groups or entities who organize such movements.

In 2004, the United Nations Commission on Human Rights established the mandate of the Special Rapporteur on Trafficking in Persons which focuses on the human rights aspects of the victims of trafficking in persons, especially women and children. The OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking provide practical, rights-based approach policy guidance on the prevention of trafficking and the protection of trafficked persons and with a view to facilitating the integration of a human rights perspective into national, regional, and international anti-trafficking laws, policies and interventions.

Migrants in Detention

Fundamental human rights standards exist to safeguard the protection of migrants deprived of their liberty. Article 9 of the Universal Declaration of Human Rights establishes that "no one shall be subjected to arbitrary arrest or detention". This universally recognized principle is also enshrined in Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which states that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

"Furthermore, as enshrined in article 10 of ICCPR, all persons deprived of their liberty shall be treated with humanity

and with respect for the inherent dignity of the human person. This implies not only the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, but also that migrants deprived of their liberty should be subjected to conditions of detention that take into account their status and needs."

Article 16 (4) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, states "Migrant Workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law."

Paragraphs 8 and 9 of the same article state respectively "migrant workers and members of their families who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used; and Migrant workers and members of their families who have been victims of unlawful arrest or detention shall have an enforceable right to compensation."

Regarding arbitrary detention, the Body of Principals for the Protection of All Persons under Any Form of Detention or Imprisonment (A/RES 43/173) reiterates that any form of detention or imprisonment shall be ordered by, or be subject to the effective control of a judicial or other authority. In addition, a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority and a detained person shall be entitled at any time to take proceedings before a judicial or other authority to challenge the lawfulness of his/her detention. In the interception of migrants lacking documentation, many States employ administrative detention of irregular migrants in connection with violations of immigration laws and

regulations, which are not considered to be a crime and may include, inter alia, overstaying a permit or nonpossession of valid identification or visa documents.

The objective of administrative detention is to guarantee that another administrative measure, such as deportation or expulsion, can be implemented. Sometimes administrative detention is also employed on the grounds of public security and public order, *inter alia*, or when an alien is awaiting a decision on refugee status or on admission to or removal from the State. Administrative detention should last only for the necessary time for deportation or expulsion to become effective. The Human Rights Committee noted that "detention should not continue beyond the period for which the State can provide appropriate justification." The Working Group on Arbitrary Detention states that a maximum period should be set by law, and the detention may in no case be indefinite or of excessive length. When foreign nationals are arrested or detained, Article 36 of the Vienna Convention on Consular Relations of 1963 provides that, if requested, the authorities of the receiving State must then notify the Consulate of the sending State without delay that its national has been deprived of his/her liberty. Any communication shall be facilitated and consular access to the detainee shall be granted.

Advances in Protection Mechanisms of Human Rights by Region

International human rights instruments bind States to abide by international principles when drafting legislation and policies that affect the welfare of migrants, but it is the sovereign right of States to regulate the entry of aliens with the terms and conditions of their stay. Regional differences exist regarding the acceptance of key instruments on the protection of international migrants.

While the Convention and Protocol Relating to the Status of Refugees enjoy general acceptance with ratification by 144 countries, many Member States are not yet inclined to ratify the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Effective

implementation of the Convention could face serious difficulties if not widely accepted. The majority of African countries have ratified the key instruments regarding international migration. In the Americas, many countries have ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air.

There is also general acceptance for the International Convention on the Protection of the Rights of All Migrant Workers and their Families, and at present, 15 countries in the region have ratified it. Countries in the Asia and Pacific region have made a significant step towards the adoption of regulations and policies that affect the welfare of migrants by ratifying international conventions on the protection of migrants. The Protocol to Prevent, Suppress and Punish Trafficking in Persons and the Protocol against Smuggling of Migrants, both adopted in 2000, have been ratified by 20 countries in the region, indicating the strong commitment of governments to combating such crimes.

As in other regions, ratification of the Migrant Workers Convention is fairly low compared to other core UN conventions. Currently, 8 countries have ratified it in the region. Despite disappointing levels of ratification, the Migrant Workers Convention still has a significant meaning within international law, as it is the broadest framework for the protection of migrants' rights and for guidance of States on how to develop migration policies while respecting the rights of migrants. The entry into force of the 1990 Migrant Workers Convention in 2003 allows it to be cited as an authoritative standard. In practice, this has made it an instrument of reference for non-ratifying countries as well as States Parties, even those that have not agreed to be bound by its standards.

In addition, some world regions have independent human rights bodies, connected to regional inter-governmental bodies, while others are covered by regional offices of the United Nations High Commissioner for Human Rights (OHCHR). The OHCHR maintains regional offices for Central Africa, Eastern

Africa, Southern Africa, Western Africa, Central Asia, Southeast Asia, the Pacific, Latin America and the Middle East regions, each of which has its own migration streams and issues.

Africa

In 1969, the Organization of African Unity created a new treaty to broaden the United Nations definition of "refugee" to include, "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality." In 1981, Member States of the Organization of African Unity adopted the African Charter on Human and People's Rights, which entered into force in 1986, to promote and protect human and people's rights.

The charter of the Organization of African Unity stipulates that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspiration of the African peoples. In Article 2 of the charter, Member States pledge to promote international cooperation having due regard for the Charter of the United Nations and the Universal Declaration of Human Rights. The Charter also established the African Commission on Human and Peoples' Rights, which is charged with ensuring the promotion and protection of human and peoples' rights throughout the African continent, complemented and reinforced by the African Court on Human and Peoples' Rights. Since 2004, the African Commission on Human and Peoples' Rights has had a Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa. The African Special Rapporteur has monitored and reported on violations of the human rights of migrants and asylum seekers, as well as engaged in promotional activities with States in the region.

The Americas

Over the years, countries in the Americas have adopted

numerous international instruments which became the building blocks of a regional system for the promotion and protection of human rights. The very beginning was the American Declaration of the Rights and the Duties of Man, approved in 1948 creating the Organization of American States (OAS). This declaration constituted the initial system of protection. The American Declaration highlights universality in its opening paragraphs "[T]he essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality" and in Article 17, "Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights." In 1959, the Inter-American Commission on Human Rights (IACHR) was created to monitor observance of the rights stipulated in the American Convention.

The Inter-American Council of Jurists was entrusted with the preparation of a draft convention on human rights and the creation of an inter-American court for the protection of human rights. In 1969, the OAS convened an Inter-American Specialized Conference on Human Rights which adopted the American Convention on Human Rights. The Convention entered into force in 1978, with the purpose of consolidating in this hemisphere a system of personal liberty and social justice based on respect for the essential rights of man. The Convention also established the means of protection, namely the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

The Inter-American Commission on Human Rights and the Inter-American Court on Human Rights have paid close attention in the past decade to the human rights of migrants and asylum seekers. In 1984, the Inter-American Commission broadened the definition of refugee applicable in the region through its Cartagena Declaration to include: "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."

Since 1997, the Inter-American Commission on Human Rights has appointed one of its own Commissioners as Special Rapporteur on Migrant Workers and their Families. The creation of the office of the Special Rapporteur shows the interest that OAS Member States have in a group characterized by special vulnerabilities and that thus is particularly prone to human rights violations. The Special Rapporteur has been active in the promotion and protection of the human rights of migrants in the region, issuing annual reports and making country visits, among other activities. The Inter-American Court for Human Rights has worked extensively to protect the human rights of migrants and has developed an important Consultative Opinion on the legal status and rights of undocumented migrants.

Furthermore, the Regional Conference on Migration, a regional body established in 1996 by countries in North and Central America, has frequently taken up the issue of the protection of the human rights of migrants in the region. In general, there is a relatively high degree of cohesion and formal commitment to international instruments relating to the human rights of migrants in Latin America and the Caribbean, which is reflected in the high participation of countries in the formulation processes.

Together with the existence of the Special Rapporteurs of the United Nations (both Latin Americans), the organs of the OAS developed several initiatives that serve; *inter alia*, to support the process of the Summit of the Americas. In addition, in inter-governmental for a on migration and sub-regional agreements on integration—such as in MERCOSUR, countries have shown an understanding regarding aspects that affect the integrity of all migrants, although without binding action.

Lastly, there are significant commitments in the process of the Ibero-American Summit, especially after the agreements of Salamanca (2005), which established international migration as a central issue of the Ibero-American Community and started on the path to design a coordinated agenda based on the principle that migration is a common good, part of its heritage and essential for its social development and cohesion,

Montevideo (2006) and Santiago (2007) and with the launch of the Ibero-American Forum on Migration and Development. Latin American civil society actively defends the human rights of migrants, with successful initiatives that have provided significant inputs into the work of the United Nations. The role of civil society organizations is relevant in this area, but much remains to be done in order to move forward.

Asia and Pacific

Despite the growth of international migration in Asia and the Pacific, protecting the rights of migrants remains on the fringes of discussion.

A notable shortcoming in policy debates has been the rights of migrant workers. While there are bilateral agreements between some countries of origin and destination in the region, mostly through memoranda of understanding, these primarily regulate the movement of workers and have little impact on the treatment that migrant workers receive in the country of employment.

Europe

The European Convention for the Protection of Human Rights and Fundamental Freedoms was drawn up within the Council of Europe. It entered into force in 1953. All 47 members of the Council of Europe are signatories of the Convention. Based on the Universal Declaration of Human Rights, the European Convention aims to represent the collective enforcement of certain rights set out in the Universal Declaration.

Besides laying down a catalogue of civil and political rights and freedoms, the Convention set up a mechanism for the enforcement of obligations entered into by Contracting States. Three institutions were entrusted with the responsibility of enforcing the obligations: the European Commission on Human Rights (1954), the European Court of Human Rights (1959) and the Committee of Ministers of the Council of Europe composed of the Ministers of Foreign Affairs of the Members States or their respective representatives.

The European Court has developed an extensive jurisprudence on the human rights of migrants, applying both European law and treaties as well as international human rights documents including the Convention on the Rights of the Child and the Convention and Protocol Relating to the Status of Refugees. Its decisions cover issues ranging from the relative weight to be accorded the right to family unity and the power to deport as well as decisions interpreting the meaning of "refugee".

CHALLENGES OF PROTECTING THE HUMAN RIGHTS OF MIGRATION

One of the main challenges in the protection of the human rights of migrants is the ratification, implementation and enforcement of existing human rights instruments. Inequality and discrimination persist and the objective of universal ratification has not been achieved. The challenge is to protect the rights of migrants by strengthening the normative human rights framework affecting international migrants and by ensuring that its provisions are applied in a non-discriminatory manner at the national level. In many cases, migrants' rights are undermined because the legal and normative framework affecting migrants is not well articulated or because officials are not familiar with the framework, do not comprehend its implications and do not know how to put it into practice or monitor its implementation.

It is essential to create awareness of migrants' rights and build national capacity to formulate and implement migration policy that respects the human rights of migrants. Protection of the human rights of migrants is ultimately the responsibility of the State. However, cooperation between governments in countries of origin, transit and destination, as well as non-governmental organizations, civil society and migrants themselves is essential to ensure that international human rights instruments are implemented and that migrants are aware of their rights and obligations. Implementation is a major obstacle to migrants' enjoyment of rights. In many countries, laws do protect migrants but are incompletely implemented;

migrants may not know about their rights; the administrative procedures to claim them are highly complex; and some government administrations do not do everything that is possible to ensure that migrants are adequately protected. States fear that these treaties would impede on their sovereign right to decide upon admission; some governments lack the capacity to implement long-term migration policies that would include the provisions of an ambitious treaty like the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW).

The human rights-based approach of international treaties regarding migration may at times clash with States' current priorities, which are often dominated by security concerns. The search for cheap labour underlies attitudes towards migration and may jeopardize the protection of migrants' labour rights. Moreover, international human rights treaties are inadequately known and understood. This particularly applies to irregular migrants, whose situation makes them more vulnerable and who may be afraid of possible denunciations in case they claim the rights that are afforded to them by both national laws and international instruments. Vulnerable groups also include elderly migrants, those with disabilities and indigenous peoples.

As migrants, the elderly, those with disabilities and the indigenous are often marginalized and excluded from mainstream society. Lacking supportive social networks and access to basic social services, many of them are dependent on others for survival. While the elderly may also suffer from age discrimination and abuse, the disabled and indigenous peoples often suffer from discrimination merely because they are different. Safeguarding the human rights of these vulnerable groups should be part of the overall strategy of ensuring migrants' rights. In many regions where States have neglected human rights obligations vis-àvis migrants, or limited their entitlements to deter further immigration, demographic factors and market forces exercise pressure on governments to improve conditions for migrant workers, especially in times of increased international competition for both skilled and unskilled labour.

Leaving respect for human rights to the forces of the market is not acceptable. A human rights-based approach calls for recognition of the fact that migrants have rights regardless of their skills-level and legal status. Practical measures are indispensable to the implementation of migrants' rights and should therefore be based upon a normative framework and should be guided by the international human rights law regime that defines migrants' rights. Implementing rights first implies knowing exactly what rights are to be afforded to migrants. In many countries, this is still a contested issue, particularly as far as irregular migrants are concerned. It is important to recall that all migrants, including those in irregular status, enjoy the human rights set out in the Universal Declaration of Human Rights and further elaborated in the core international human rights instruments.

In order to ensure an effective platform for the protection of the human rights of migrants, it is necessary to be cognizant of the international human rights instruments, eradicate the prejudices that impede their effective implementation, and demonstrate their validity. It is essential for all stakeholders including immigration officers, migration policy makers, law enforcement officials, the migrants themselves as well as the public at large to know the international legal framework governing migration and displacement, including international human rights instruments. Awareness of applicable laws, and knowledge of legal definitions (such as 'refugee' and 'migrant worker') and distinctions, *e.g.* between human trafficking and the smuggling of migrants, are often not as widespread as they should be. As realizing a human rights-based approach to migration requires multistakeholder engagement, a better understanding of the rights and obligations of States, migrants and other stakeholders under international law must be promoted at all levels of governance and across sectors.

Indeed, the link between training and the protection of the human rights of migrants was stressed by Gabriela Rodriguez Pizarro, the former United Nations Special Rapporteur on the Human Rights of Migrants: "Training of key stakeholders including ministry officials, consular officials,

border guards, social and legal counselors is essential in offering adequate protections to migrants... it should assist in sending the message that a human rights approach to migration does not mean 'opening the borders to all migrants' rather ensuring that migration can take place in a human, orderly and dignified manner." Fostering cooperation between States also implies a common understanding of the principles underlying migrants' protection. Given the transnational nature of migration flows, cooperation is indeed necessary—as no State alone is able to govern the cross-border movements of people. Yet, evidence shows that States have different approaches to migration management and, consequently, sometimes divergent views on their policy priorities in terms of migration management. This fact points to the need for common standards that make cooperation possible. Only if States attempt to speak the same language and share the same conceptions of what migrants' rights are about can they truly engage in not only discussions, but also actual cooperation. Moreover, standards are crucial in guaranteeing the universal distribution of rights.

It has become clear that migrants constitute a heterogeneous category: there are documented and undocumented migrants, migrant workers and family members, skilled and low-skilled migrants, men and women, etc. In practice, such heterogeneity may generate differential treatment among migrants: skilled migrants would be better treated than their unskilled counterparts, migrant workers would be welcome but not their family members, migrant women suffer from specific discriminatory problems, etc. Not all migrants face the same vulnerability vis-à-vis the protection of their rights. While arguments of principle in favour of a strong international human rights law regime abound, reality indicates that some States display reluctance towards migrationrelated conventions.

This applies to International Labour Organization (ILO) Conventions 97 on Migration for Employment and 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers as well as to the International Convention

on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), ratified by 39 States. Still, 79 States have ratified or acceded to at least one of these three legal standards/conventions on migration and migrant workers; a number of States have ratified two of them and several have ratified all three complementary instruments. The low level of ratification of these three treaties is only partially remedied by the fact that migrants are protected by other—and more widely ratified—human rights instruments, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

A new impetus should be given to the ratification of human rights instruments. To a large extent, renewed and coordinated efforts involving both non-governmental organizations (NGOs) and international organizations have given a new visibility to these treaties, in particular to the ICRMW. In addition, the contemporary interest in international migration management, indicated, inter alia, by recent events such as the High-Level Dialogue on International Migration and Development and the Global Forums on Migration and Development, provide a key opportunity to bring fresh air to international human rights law.

For instance, the second Global Forum on Migration and Development will address the protection of migrants and will focus on practical means to improve migrants' empowerment and protection. This issue of protection will be tackled from both the perspective of sending countries (aiming at protecting nationals living abroad) and of destination countries (responsible for ensuring the human and labour rights of the people living on their territory), with particular emphasis on how States can cooperate to advance and ensure the protection of migrants. The Global Commission on International Migration (GCIM) emphasized that international cooperation in the field of migration is conditional on a minimum level of national capacity.

This also applies to the respect for and fulfillment of international human rights obligations. A pragmatic approach

may require acknowledging the fact that some States do not have the capacities to fulfill all human rights obligations immediately and thus need to work towards "progressive delivery based on current capacities." Nevertheless, this should not preempt the responsibility to apply core human rights principles, such as the principle of non-discrimination. It certainly calls for long-term commitments to capacity-building based on predictable funding. The sustainability of such efforts will depend on the successful transition from international engagement to local ownership, which should be well planned and managed.

Irregular Migrants

Irregular migration is not only a phenomenon occurring between developed and developing countries, but in all parts of the world. The abusive conditions under which irregular migrants may move and live are well documented. While the causes of irregular migration are as numerous as the phenomenon is diverse, it has been strongly argued that control measures alone are insufficient to tackle irregular migration and that a comprehensive approach is required, including the need to adopt a package of more "constructive" measures.

The protection of the rights of this vulnerable group forms an integral aspect of such a comprehensive approach which also comprises the need to address informal labour markets where both national and migrant workers are found; provide more regular avenues for migrant workers to be able to meet the demand for labour in all sectors of a destination country's economy; and give serious consideration to the regularization of those with irregular immigration status. An important way of addressing the phenomenon of irregular labour migration is to effectively protect the rights of those with irregular status in order to undermine any incentives employers and intermediaries might have in encouraging such movements.

For decades many States have responded to persistent irregular migration by intensifying border controls, with the incorporation of a human rights perspective to varying degrees. State measures of border enforcement, anti-trafficking

initiatives and immigration control measures have ranged from an increased use of the armed forces or military methods of policing the border, confiscation of the proceeds of trafficking, tougher sanctions against the employers of undocumented migrants and commercial carriers that bring to their borders foreigners without proper documentation, radar surveillance, and detention and expulsion of unwanted aliens. This has also involved, inter alia, fingerprinting, the erection of walls and the deployment of semi-military and military forces and hardware in the prevention of migration by land and sea. While many of these measures fall legitimately under the auspices of managing incoming migration flows, they can fail to take into account both the international human rights framework that exists to universally protect all people on foreign territory, regardless of nationality, and can result in abuses of the foreign-born population in all stages of the migration process (including transit and return).

Despite the increasingly complex methods necessary to manage migration, States and other governmental and non-governmental interlocutors need to better incorporate the protection of migrants into these measures (*e.g.* through training and capacity building, and through development and implementation of migration management policies). This position is not intended to excuse irregular migration, nor encourage it, but rather to underscore the importance of States to adhere to international human rights standards during engagement with all migrants, whether documented or not. Accordingly, States should take measures to further promote legal migratory channels and revise policies and practices to incorporate enhanced protection of migrants during all phases of the migration process. The United Nations Development Programme (UNDP) Human Development Report notes that in both richer and poorer countries, one of the greatest challenges for migrants is their legal status.

There is a 'sea of gray' between full citizenship and legal status. This uncertainty affects migrants' full participation and entitlements in society, such as receiving health and education services and ability to enter the work force without being

subjected to discrimination. States should cooperate with a view to fostering regular migration and investing in providing legal protection to migrant workers, instead of just focusing on security aspects.

Female Migrants

Over the last few decades there has been a steady increase of female participation in international migration movements. In 2005, female migrants accounted for 49.6 per cent of all international migrants. However, there are differences in the sex-distribution of migrants among the various regions in the world. Female migrants account for 53.4 per cent of all international migrants in Europe and 51.3 per cent in Oceania, exceeding therefore the number of male migrants, while they comprise only 44.7 per cent in Asia and 47.4 per cent in Africa.

The percentage of female migrants in sub-Saharan Africa has increased from 40.6 per cent in 1960 to 47.2 per cent in 2000. In comparison, the share of female migrants in Eastern and South-Eastern Asia increased over the same period from 46.1 per cent to 50.1 per cent in 2000. The causes of the regional differences can be found in the regulations administrating the admission of migrants in the various countries of destination and those governing the departure from countries of origin, in conjunction with the correlation of factors determining the status of women in the countries of origin and destination. The stock of female migrants has actually grown at a faster pace than the stock of male migrants in the most important countries of destination, in developed as well as developing countries. But equal numbers do not necessarily translate into equal treatment. It is becoming increasingly evident that migration is not a “gender-neutral” phenomenon: men and women display differences in their migratory behaviours and face different opportunities, risks and challenges, including factors leading to irregular migration; vulnerability to human rights abuses, exploitation, and discrimination; and health issues.

The experience of female migrants differs from that of men from the moment women decide to migrate. While

historically women tended to migrate for marriage or family reunification, recent decades have seen an increase in women migrating independently and as main income-earners. Today, female migrants make up approximately half of all migrants. The increased female migration has raised both prospects and challenges. Female migration has a tremendous potential. It can advance gender equality and women's empowerment through opportunities that it opens for greater independence and self-confidence. It can be a vehicle for enhancing the status of women by breaking through oppressive gender roles. It can give rise to structural and institutional changes as well as changes in mind set, understanding and lifestyle. It can redress social and economic imbalances.

Migration provides women with income and the status, autonomy, freedom and self-esteem that comes with employment. Women become more assertive as they see more opportunities opening up before them. However, gender inequalities, including violence against women, can increase with migration, therefore generating risks and vulnerabilities. In some environments, female migration is accompanied by human rights violations, exploitation and abuse.

Female migration can also involve a significant amount of tension, especially since it often breaks through established values and practices and produces higher psychological costs for women than men. Female migrants often face multiple discrimination in the migration process on account of their nationality, immigration or social status as well as gender. The continued abuses suffered by many women migrants, who fulfill important but often undervalued tasks in host societies, and the frequent absence of formal protection in national labour legislation raise important questions in safeguarding the human and labour rights of female migrant workers.

Addressing gaps in many countries' legislation in recognizing domestic work as formal employment, with the same conditions of work and protections as other workers, would make significant inroads into addressing challenges faced by many migrant women. Finally, the exploitation and abuse migrant women face in the context of trafficking in human

beings requires strong government responses in the areas of prevention, protection and prosecution. Women should be made aware of their options, regarding the migratory process itself, and conditions in the country of destination, so that they can make informed decisions. While the fact that women are migrating on their own rather than as part of family migration seems to indicate greater freedom and choice, very often this is not the case at all. Discriminatory applications of migration law expose women to greater risks of human rights abuse. While most migration policies are not designed to favour one gender over the other, women can be denied entry due to restrictions imposed on admission of migrants for female types of occupations. Restrictive regulations which give women less chance of migrating legally than men force them to migrate clandestinely. When legal channels are not available, many women see trafficking or smuggling as the only option to cross the border.

This places them at increased risk of exploitation and abuse. The more opportunities there are for regular channels of migration, the less incentive will there be for trafficking of people, exploitation and serious abuse of migrants in the countries of origin, transit and destination. Some women turn to, or are lured by, "brokers" to help them migrate clandestinely leaving them open to discrimination, exploitation, violence and abuse. Many become victims of human trafficking. Girls and women victims of trafficking, refugees, transit and irregular female migrants are most vulnerable to human rights abuse. Their situation is exacerbated by the failure of countries to address this tragedy. Female victims of trafficking have little recourse to the law. Many of them are in the country illegally and are afraid to report abuses and seek help from local authorities. They are literally slaves of their traffickers, trapped in a situation over which they have no control. Many of the women suffer extreme violence, illnesses and diseases, and irreparable physical and psychological harm.

Women migrants who are forced into sex work are also at great risk of contracting HIV/AIDS. Female migrants who flee conflict situations are also often subjected to gender based

violence, sexual abuse and exploitation. Refugee camps do not always provide protection from such abuse. Also of concern is the growing number of transit migrants, although female migrants represent only a small proportion of all migrants in transit. The exact magnitude of transit migration is unknown since data on the inflows and outflows of foreigners, both legal and undocumented, as well as information on their duration of stay and their intentions are not available. Migrants stay for extended periods in transit countries voluntarily or because of a growing difficulty to move onwards.

The vulnerability of female migrants increases with the prolongation of the migratory process. Female migrants who are victims of sexual assault in countries of transit demonstrate the need for special protection schemes to ensure the right to physical integrity and protection from criminal assault. Although legal channels to migration exist, there is no guarantee that female migrants will obtain the jobs that they were promised.

Many women and girls typically apply for advertized jobs as babysitters, models, hairdressers, dancers or waitresses with friends or relatives acting in some cases as recruiters. Once in the country of destination, they realise that these jobs do not exist. Instead they find themselves in the hands of traffickers who often violate victim's rights by seizing passports or other identity documents, not living up to promises or contracts, withholding pay, and forcing women into subjugation or even sex work. The rule of law and effective criminal justice systems actively addressing the crimes of human trafficking and migrant smuggling are essential for the protection of migrants' rights and of those who are trafficked and smuggled. Adequate legal frameworks and institutions in the countries of destination are essential to ensure that justice is served and that victims receive compensation for the suffering they endure. Strengthening the criminal justice response to migrant smuggling and human trafficking is a core element.

When designing such policies, upholding human rights and protecting the safety and lives of migrants must be paramount. Many female migrants lack access to much-needed

health services. National and local health authorities typically pay little attention to the health conditions of international migrants. Policymakers rarely address issues of family planning or reproductive health of migrants but focus more on infectious diseases that migrants might bring into the country. Even when health services are available, other obstacles, including language and communication problems, cultural differences regarding the perception of health and health care, and lack of information about what is available often prevent women migrants from seeking medical care and health services. Female migrants are less likely to seek prenatal services than nationals, especially when their official status is uncertain.

Female migrants who have been sexually abused or forced into sex work and live with HIV/AIDS often do not seek medical attention out of shame or fear. Female genital mutilation (FGM) is another issue that has caused concern in countries receiving migrants from countries where this practice is prevalent, because of the presence of gynecological problems and psychological trauma associated with FGM.

In dealing with irregular migration of women, States must take into account that during the migration process women's health conditions could have been negatively affected through FGM and reproductive healthrelated illnesses and should therefore provide necessary services to avoid further complications or even the death of female migrants. The lack of sex-disaggregated migration data and gender-sensitive research is a major challenge. Good data on flows of international migrants and cyclical migration, as well as research on the root causes of migration and the extent of human rights abuses are essential to sensitize policymakers to the needs of female migrants and for evidence-based gender-sensitive policy formulation and programme implementation addressing the needs of female migrants. Data and research are needed to identify the gaps in gender equality throughout the entire migration process, develop strategies to close those gaps, and monitor implementation.

This knowledge may help in the process of managing migration. The international women's rights regime

acknowledges the different rights of women at distinct stages of their lives. To protect the human rights of female migrants throughout the entire migration process, it is essential to consider female migration from a life cycle approach, examining the situation of women and girls before they migrate, as they migrate, their situation abroad, and upon return to the country of origin. Insufficient attention to female migration holds back development and reduces the possibility of achieving the Millennium Development Goals (MDGs). The international community should be made aware of the contributions of female migrants to countries of origin and destination. Effective measures must be taken to combat misconceptions and misleading information on the female migratory profile.

Existing laws and international instruments and agreements should be strictly enforced, and legal protection systems should be put in place to ensure the protection of the human rights of female migrants. Such protection mechanisms should include, inter alia, laws and policies in compliance with international human rights standards, including laws and policies that recognize the right of female migrants to available, accessible, acceptable and high quality basic services; freedom from discrimination based on sex, origin, religion, etc.; the right to access to justice, including legal assistance in cases where female migrants need it; effective institutions that promote and protect the rights of female migrants, including the judiciary and national human rights institutions such as ombudspersons and national human rights commissions; and mechanisms ensuring respect and protection of the rights of female migrants, such as redress and reparation procedures in case of violations of human rights. All policies and legislation concerning international migration should be human rightsbased. Strategies in the country of origin, transit and destination should encompass protection mechanisms relevant to female migrants.

Migrant Children

Children are crossing international borders in greater

numbers and face many risks in the process. Children and women are particularly vulnerable to trafficking, abuse and exploitation, especially during prolonged migratory processes. Risks for children are even greater when they travel unaccompanied, separated or without documentation. Even when migrating with their families, however, the migration process is not risk free. Migrant children are often confronted with serious institutional, social and psychological barriers, especially when parents occupy marginal positions in the country of destination. In labour sending countries, a growing number of children are left behind by one or both parents. In host countries, migrants and their families are often vulnerable to discrimination, poverty, insecurity and social marginalization. For undocumented migrants, there are additional concerns such as under-paid wages, lack of access to educational, health and basic social services as well as the possibility of arrest, detention and repatriation. The rights of all children affected by migration processes have, therefore, become a matter of growing concern to the global community.

However, there is also a growing awareness of the value of promoting, protecting and fulfilling children's rights in view of the accompanying empowering effect that can enable them to claim their rights. Applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification should be dealt with in a positive, humane and expeditious manner. States Parties should further ensure that the submission of such a request should entail no adverse consequences for the applicants and for the members of their family. A child whose parents reside in different States should have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents.

Towards that end and in accordance with the obligation of States Parties the right of the child and his or her parents to leave any country, including their own, and to enter their own country should be respected. The right to leave any country should be subject only to such restrictions as are prescribed by law and which are necessary to protect the

national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the Convention on the Rights of the Child. Children of migrant workers, whether they have migrated with their parents or were born in the host country, may be denied access to basic services, including health and education, with language difficulties often being a serious impediment to the latter. Children who are not in school, whether due to denial of access or the pressure to contribute to family earnings, become vulnerable to the worst forms of child labour, including commercial sexual exploitation.

When children migrate with parents or are born to migrants in destination countries, the benefits of a better standard of social services may be reduced by disadvantages such as discrimination, xenophobia and racism, relative poverty, language barriers, unequal rights and the lack of integration policies. Migrant children may also be the subject of adult decision- making by members of the family or others, which in some cases also exposes them to significant harm.

The vast majority of children who migrate do so for the purpose of family reunification. Several countries apply extreme measures, allowing only their own nationals the opportunity to emigrate, including for the purpose of family reunification. Migrants then have no option but to seek irregular ways to migrate and this places children at high risk, particularly when they travel unaccompanied. Legal identity, a problem faced by all migrants, is particularly difficult for children. In some countries, children born to foreign parents do not generally qualify for citizenship. Irregular migrants may also face difficulties in obtaining birth registration for their children. Children without identification documents are usually excluded from formal schooling, and it may be difficult for them to socialize and to create social networks because of language and cultural barriers.

In addition, migration puts unique stresses on children– leaving a familiar social context and extended family network; entering a new place, culture, and language; and harsh conditions endured before or during the transition. The stress

can be even more intense for adolescents. Migrant children who do not connect in some meaningful way with their peers, family or school are at an increased risk of depression, self-harm, including suicide, substance abuse, failing or dropping out of school, mental health problems and entering into conflict with the law. The impact of migration on children, especially girls, must be seen in the broader context of poverty and conflict, and within the perspectives of vulnerability and resilience, gender relations and children's rights.

From a gender and rightsbased approach, it is important to foster constructive solutions to better meet the challenges faced by children and adolescents moving from one country to another in search of security, and protection, and improved standard of living. Migration should be positioned within the context of a human rights framework that provides protection for all children, adolescents and women affected by migratory processes. States that are parties to international human rights treaties are obligated to offer protection to the rights of non-nationals as well as direct protection to children as long as they remain in their territory.

Migrant children become non-nationals or aliens once they leave home and cross national borders and face a new social environment, but these circumstances should not imply a restriction of their human rights, whatever their migration status. Whether on their own or with family, children are increasingly becoming migrants in search of survival, security, improved standards of living, education or protection from abuse. Also affected are children left behind by one or both parents and children living in areas with high migration rates. Policies should take cognizance of how migration affects these children and protect their rights by enhancing access to benefits of migration while simultaneously protecting against vulnerabilities.

The CRC and the CEDAW provide the rights and gender framework within which the special needs of migrant women and girls can be addressed. These treaties oblige States to maintain a gender perspective in migration laws and policies, particularly in receiving countries. These areas require greater

attention from researchers as well as policy and law makers dealing with migration issues. The challenge for policy and law makers is to establish rules and regulations that meet the requirements of international conventions, including the CRC and CEDAW. "Protection gaps" and grey areas exist in irregular and mixed migration flows.

The increasing numbers of unaccompanied children crossing borders, including through irregular maritime migration, puts them at risk and exposes them to exploitation, abuse and violation of their rights. Unaccompanied migrant children may suffer deportation or repatriation measures, or be detained, without respect for their best interests. Migrant children may be separated from their parents, *e.g.* when they are deported from the country of residence, which may be in breach of provisions contained in universal human rights treaties, protecting the family as the fundamental part of society. Moreover, the principle of best interests of the child is not always properly considered in family reunification policies and measures.

Irregular migration occurs in the absence of documents and often involves human smugglers and traffickers. There is a need for specific rights and gender-based responses and approaches to address concerns, especially as it relates "to migrants deemed 'irregular' by the authorities who fall outside the international refugee protection framework but who nevertheless need humanitarian assistance and/or different kinds of protection." Poverty, lack of access to education, unemployment, gender inequality and risk of HIV/AIDS increase vulnerability to irregular migration and trafficking. Protection gaps for mixed migration flows are substantial and need to be addressed urgently.

It is important to identify migrant children within mixed movements, so as to ensure access to protection and meet their needs. In countries of origin, the migration of parents has created new challenges for children left behind, including family instability, increased household responsibilities, social stigmatization and limited access to essential services, such as health, education, etc. The educational achievement of children

left behind is often compromised by their obligations to fulfill household duties and care for younger siblings. An assessment of the Millennium Development Goals indicates that the goals can be fully achieved only if the promotion and protection of children's rights is made an integral part of programming strategies and plans.

Children left behind may be at greater risk of drug abuse, teenage pregnancy, psychosocial problems and violent behaviour. Children left behind must be covered by gender-sensitive social protection policies to ensure that all forms of discrimination and victimization are avoided; further, to be effective, social policies must be adapted to the specific circumstances faced by vulnerable children.

International organizations and governmental stakeholders play a crucial role in raising awareness of the situation of migrant children and in promoting the appropriate response from governments and civil society regarding the adaption of respective legislation for the promotion and protection of the rights of migrant children in accordance with the CRC.

Moreover, there is a significant lack of information about migrant children or those who are left behind in countries of origin. Without accurate reliable data on the numbers of children affected by migration, including migrant children, it is difficult to develop and implement suitable programmes and policies to respond to their needs and promote the realization of their rights. Even without extensive substantiation, it is clear that the impact of migration on children is a matter of growing concern worldwide.

Migrant Workers

Linkages between Protection of Rights, Decent Work and Development

The linkages between protection of rights and development are articulated in international labour conventions, in discussions at the International Labour Conferences and other international fora as well as in authoritative documents, such as the International Labour Organization (ILO) Multilateral Framework. Analyses have

revealed that deficits in decent work are at the origin of migration flows. In other words, the inability of workers to exercise their right to work in their own countries pushes them to migrate in search of employment.

The Conceptual Underpinning

ILO Director-General, Juan Somavía: "Gains from migration and protection of migrant rights are indeed inseparable. Migrant workers can make their best contribution to economic and social development in host and source countries when they enjoy decent working conditions, and when their fundamental human and labour rights are respected." Despite the positive experiences of many migrant workers, a significant number face undue hardships and abuse in the form of low wages, poor working conditions, virtual absence of social protection, denial of freedom of association and workers' rights, discrimination and xenophobia, as well as social exclusion.

The granting and denial of visas based on the particular national origin of the applicant and on the grounds of national security are some of the common realities facing migrant workers and which is a cause of concern. These developments erode the potential benefits of migration for all parties, and seriously undermine its development impact. The workers most vulnerable to abuse of human and labour rights are women migrant workers, especially domestic workers, migrant workers in irregular status, trafficked persons and youth migrants.

Low skills add to the vulnerability of migrant workers while skilled workers are in a better position to protect their rights. Great differences exist in the labour profiles of male and female migrants. Men and women circulate differently in the global economy.

Education and skills enhancement opportunities for girls and women are limited in many sending countries. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) describes the need for equal rights with men in the field of education and in particular to ensure, on a basis of equality, their conditions for career and vocational

guidance. With less educated women ending up predominantly in the service and welfare sectors, in traditionally female occupations with precarious working conditions, many women migrants, especially those found in the informal sector of the economy are without adequate protection.

This makes women more vulnerable to exploitation and human rights abuses, including low wages, illegal withholding of wages, and illegal and premature termination of employment because they are often found in gender-segregated and unregulated sectors of the economy, including domestic work, entertainment, and the sex industry which often are unprotected by local labour legislation. The fact that gender roles are traditionally established and that men often do not share the domestic chores, particularly looking after children on a daily basis, makes it even more difficult for women to develop personally and professionally.

The CEDAW calls on countries of destination to support measures at the work place to prevent discriminatory treatment of female migrants and facilitate the integration of women including by enforcing labour rights and encouraging the host community to accept them as contributing members of society. To reduce female migrants' vulnerability and marginalization, their cultural diversity needs to be respected. Countries of origin should facilitate the migrants' return and reintegration into society especially for those who have been victims of human rights abuse and human trafficking.

A number of issues are at the intersection of protection and development. Wages of migrant workers, significant parts of which become the remittances they send back home, are one such issue. Remittances are the most tangible way in which migrant workers contribute to poverty reduction, employment creation and development in their countries of origin.

Article 9 of Convention No. 97 on Migration for Employment states that each party to the Convention undertakes to permit, taking into account national laws and regulations, the transfer of such part of the earnings and savings as the migrant may desire. Article 47 of the ICRMW provides that migrant workers shall have the right to transfer their

earnings and savings and that States concerned shall take appropriate measures to facilitate such transfers.

Non-payment or underpayment of wages denies migrant workers part or all of their incomes and deprives their countries of origin of remittances that could be used for reducing poverty and promoting development. Ensuring the payment of wages as such is laid down in the Protection of Wages Convention of 1949, and is a right that has important implications for migrant workers and their countries of origin.

The Committee on Migrant Workers emphasized that equality in remuneration and conditions of employment on the one hand protects migrant workers from abuse and, on the other hand, removes the incentive for employers to resort to irregular recruitment or employment. In countries of destination, migrant workers are better able to meet labour demand, use their entrepreneurial skills and enlarge the supply of goods and services when they have access to training, skill recognition and labour mobility, in equality with native workers. Remuneration and social security benefits allow them, as consumers, to increase demand for goods and services and thus to contribute to economic growth.

The exercise of these rights also contributes to preserving the competitiveness of native workers in labour markets of countries of destination. Allowing migrant workers to work for a lower pay, for longer hours and/or without access to social security can reduce the cost of their labour compared with national workers, thereby undermining the latter's chances in their own labour markets. Social integration of migrant workers and their families, manifested in their exercise of the rights to work, to education, to housing and other relevant rights, allows them to raise their productivity and the level of their contributions to the economies of countries of destination.

Rights of migrant workers, the use of their full potential and their contributions to development would be furthered by the licensing and supervision of recruitment and placement services. The Private Employment Agencies Convention 1997 (No. 181) and its Recommendation (No. 188) draw the parameters of policy in this respect. Temporary migration is

an issue of importance in current discussions on the protection of rights and development. Its goal is to help meet specific short to mediumterm demand for labour in countries of destination, while avoiding the permanent loss of skills and the detrimental consequences for development in countries of origin.

These are worthy considerations. However, the proliferation of temporary migration schemes should not lead to the curtailment of the rights of migrant workers in the work place, especially regarding the principles of equality of treatment with national workers and non-discrimination. The view that such programmes necessarily involve a trade off of migrant numbers with their rights undermines the framework of migrant protection and rights elaborated in international instruments. "It is extremely important that those programmes [of temporary and circular migration] are in strict compliance with the relevant international human rights instruments, in particular to ensure non discrimination with regard to remuneration and other conditions of work.

The ILO Multilateral Framework has provided some guidelines on this issue. The most relevant is Guideline 5.5 which calls for: "ensuring that temporary work schemes respond to established labour market needs, and that these schemes respect the principle of equal treatment between migrant and national workers, and that workers in temporary schemes enjoy the rights referred to in principles 8 and 9 of this Framework." Guideline 9.9 calls for ensuring that "restrictions on the rights of temporary migrant workers do not exceed relevant international standards." Less concern about human rights is usually voiced in the current discourse on skilled and highly-skilled migrants.

Rather, the discussion is framed in terms of migrants' value as human capital and focused on potential modes of sharing human resources ("a mobile and global pool of professionals") among States. Indeed, often the language applied to highly skilled migrants and diasporas reflects associations of resource extraction, using terms such as "tap into," "harness" and "leverage". Not only is this at odds with a human rights-based

perspective, it also neglects the fact that many migrant associations and diaspora organizations represent an elite not because of their educational achievements or abundant resources, but because they choose to act.

Refugees

Serious human rights or humanitarian law violations are at the origin of refugee flows. Refugee protection itself is about upholding human rights of individuals during displacement. Voluntary return of refugees in safety and dignity is only possible if root causes generally linked with serious human rights violations have been addressed in a sustainable manner. Speaking broadly of humanitarian action, the Inter-Agency Standing Committee (IASC) has stated: "Protection of human rights is intrinsic to effective humanitarian action." This statement points to the fact that human rights violations and resulting protection issues are usually a central element of complex crisis situations. They are also typically at the heart of the problem that has contributed to, or been exacerbated by, armed conflict.

Current Refugee Protection Challenges

The Office of the United Nations High Commissioner for Refugees (UNHCR) estimates that over 16 million people were refugees at the end of 2007. As of the end of this year, roughly one third of all refugees were residing in countries in the Asia and Pacific region. The Middle East and North Africa region hosted a quarter of all refugees, while Africa and Europe were host to respectively 20 and 14 per cent of the world's refugees. The Americas had the smallest share of refugees–9 per cent.

Thousands of persons in various countries of the world, who are fearful of applying for refugee status or who are denied that status, go underground and become illegal migrants. The right to seek asylum is often threatened where asylum-seekers are part of mixed population movements. Many who flee persecution and conflict are unable to use legal means to reach safety and undertake perilous journeys with those fleeing poverty or precarious living conditions. In the process, they

frequently face torture, rape, abuse and exploitation by smugglers, pirates, officials and others. Unaccompanied and separated children caught up in irregular movements are at particular risk of sexual and labour exploitation.

The right to seek asylum is jeopardized if shipmasters do not rescue those in distress and when governments are unwilling to disembark those rescued, including asylum-seekers. States' protection responsibilities are relatively clear where individuals are intercepted or rescued in territorial waters, but differences remain over protection obligations outside such waters. The right to seek asylum is also jeopardized by difficulties regarding access to fair and effective asylum procedures or those which are poorly developed, not based on timely and accurate country of origin information, or duly sensitive to age, gender and diversity. Refugee recognition rates for asylum-seekers of certain nationalities diverge widely among and within States.

The right to life, liberty and security of person is central to the enjoyment of asylum. Yet physical insecurity is increasingly the hallmark of many situations of displacement. Cases of camps attacked by rebel groups and forced recruitment of children by armed groups pose problems in a number of operations. Insecurity also restricts humanitarian access by the United Nations Office of the High Commissioner for Refugees (UNHCR), and other United Nations and non-governmental organization partner staff, and exposes refugees to high risk. As noted by United Nations Secretary-General, Ban Ki-Moon, critical humanitarian access to civilian populations is often currently "anything but safe, certainly not timely and far from unhindered." In many situations, sexual and genderbased violence remains a major problem for asylum-seekers and refugees, particularly women and girls.

Many are exposed to rape, the risk of HIV infection, attack, abduction, honour killings, female genital mutilation, child marriage, sexual harassment, and other violations of the rights to life, freedom from torture, cruel, inhuman or degrading treatment and an effective remedy. Their abuse is often linked to anti-migrant sentiments, reflected in the policies and

frameworks of the countries of destination and transit designed to manage migratory flows in a purely restrictive manner. Refugee camps do not always provide protection from such abuse. Caught up in general antiforeigner violence or specifically targeted, asylum seekers are sometimes forced to move to other parts of the country or even killed. Refugee protection has become more complex in recent years due to the increasing difficulty in availing access to asylum systems resulting from heightened security considerations.

Many who have been refused asylum remain in the country of destination and, together with those who have overstayed their visas or crossed borders without the proper documents, contribute to the growing numbers of irregular or undocumented migrants. Irregular migrants often cannot fully exercise their human rights, lack basic health services and face abuse and exploitation. States increasingly resort to the detention of asylum-seekers and refugees, including children. Sometimes detention periods are prolonged, at times even indefinite.

In some situations, conditions are so overcrowded and poorly ventilated, without the most basic amenities or nutrition, as to amount to inhuman and degrading treatment. In some cases detention has resulted in death. Continuing difficulties in securing access to the right to work for asylum-seekers and refugees reflect reluctance on the part of many States to allow foreigners access to national labour markets. Yet, access to employment is essential to realizing other human rights and is inherent to human dignity. It can protect against sexual and gender-based violence and is integral to achieving self-reliance and durable solutions.

The right to a standard of living adequate for health and well-being, including to clothing, housing and medical and necessary social services is related to numerous rights, access to which should be granted on a non-discriminatory basis, including as regards national origin, physical or mental disability, or health status (for instance, regarding HIV/AIDS). It encompasses access to safe, potable water and adequate sanitation and access to health-related education and

information, including on sexual and reproductive health. In urban environments, many asylum-seekers and refugees are unable to access housing, health-care and other services, whereas due to resource constraints, facilities often remain poor in refugee camps. The right to adequate food is critical to the enjoyment of all other human rights. It has become an urgent issue particularly in light of the most recent rise in food commodity prices, diminishing food stocks and resulting in shortfalls in delivery of humanitarian assistance in a number of displacement situations.

Addressing the Challenges and Gaps

States bear the primary responsibility for protecting the human rights of all persons within their territory or subject to their jurisdiction. Recurring global protection challenges are brought to the attention of the Executive Committee of the UNHCR Programme (ExCom) for its guidance, including through ExCom Conclusions. In the field of refugee protection and international migration, the High Commissioner's Dialogue on Protection Challenges, involving a wide range of stakeholders, took place in Geneva in December 2007 to discuss refugee protection, durable solutions and international migration.

The meeting recognized that there are protection gaps in mixed flows, especially as regards migrants deemed by the authorities "irregular" who fall outside established protection frameworks, but who otherwise need humanitarian assistance or other kinds of protection. The Dialogue called for rightsbased approaches in addressing these gaps and placing all migrants' human rights and dignity to the fore.

Other global issues may be addressed, such as those issued to assist States in properly applying the refugee definition contained in Article 1 of the 1951 Convention, addressing gender-based persecution, or determining when victims of trafficking are at risk of persecution on refugee grounds if returned. Why is it necessary at all to envisage refugee protection in reference to human rights? In answering this question, in the first instance, the importance and validity of

the refugee law and protection regime in its own right must be reaffirmed. This regime clearly lays down the duties and obligations that are owed to refugees and the rights they are entitled to claim as a matter of international law. Refugee law and protection have, over the years become well-known, accepted and essentially adhered to across the world.

This predictability is critical in actual, concrete actions to protect refugees whether through diplomatic means or judicial litigation. All this deserves to be respected, re-validated, nurtured and further developed. To assert the relationship between this regime and that of human rights protection is, however, not only about making an academic point, although that is useful in its own right in advancing the knowledge and awareness that still needs to be fostered on this issue. The emphasis is, however, also useful as a reminder, which remains necessary from time to time, that refugees are not some obscure technicality but are, after all, human beings.

They bear human rights, and the imperative to respect and advance those rights as do all other human beings. The connection thus plays both a tactical and operational function. Even in situations where the 1951 Refugee Convention is applicable because of accession, reference to human rights of refugees, and not only refugee law entitlements, has a strong rhetorical and reinforcing function. But in those countries which have not acceded to the 1951 Convention or any other international or regional refugee instruments, human rights law comes to provide the essential bedrock for protection advocacy and action. For all these reasons, every opportunity must be taken to elaborate, foster and make known the nature and interconnections between the two regimes.

Smuggled Migrants and Victims of Trafficking

Developing effective responses to address human trafficking and migrant smuggling, as issues of irregular migration that impact on the human rights of those who are trafficked or smuggled, raises many challenges. At the point or country of origin, traffickers and smugglers alike take advantage of people's vulnerabilities, particularly those who

may be desperate to migrate in an attempt to establish a better life. Traffickers and smugglers look to profit from the vulnerabilities of people by offering them incentives and the means to migrate looking for better opportunities. Smuggled migrants may suffer violence, sexual abuse and other life threatening situations along their migration route to the destination point.

Trafficked victims may suffer the same and are subject to exploitation. Once at the destination, smuggled migrants' status as illegal immigrants makes them vulnerable to abuse and discrimination while trafficked victims will suffer exploitation at the hands of their traffickers. It is essential that the differences between trafficking in persons and smuggling of migrants are understood before an effective policy response to both crimes can be developed and implemented.

There are increasing reports of abuse by smugglers inflicted against those who are smuggled. In this regard, smugglers and the activity of people smuggling has the potential to seriously endanger the life and health of those who are smuggled. The death and serious injury toll from smuggling has dramatically increased in recent years, indicating the potentially serious human rights abuses that smugglers can inflict against those who employ their services.

Knowledge and Awareness of Trafficking in Persons and Smuggling of Migrants as Crimes Against Human Rights

When responding to instances of human trafficking and migrant smuggling, it is often the case that law enforcement and criminal justice practitioners will approach the investigation and prosecution with a focus on targeting the smugglers and traffickers for their role in the facilitation of illegal immigration.

At the same time, they often look to deport those who are illegal immigrants as a result of being trafficked and/or smuggled. Human trafficking is often incorrectly treated by law enforcement officials as a crime of illegal immigration first, before it is recognized as a crime against the person who has

suffered extreme human rights violations from having been exploited. While trafficking in persons and smuggling of migrants often involve illegal methods of migration, it is not always the case. More knowledge and awareness among law enforcement and criminal justice practitioners of the human rights aspect of human trafficking and migrant smuggling needs to be developed.

Responding to human trafficking from a human rights-based approach (as opposed to an approach that targets only the traffickers) works to protect and support the trafficked victims as well as to benefit the criminal investigation and prosecution case. Where trafficked persons are treated as victims of crime as opposed to illegal immigrants, they are more likely to assist in the criminal investigation and recover from their trafficking ordeal. Smuggled migrants need to be recognized by law enforcement and criminal justice practitioners as potential victims of human rights abuse.

Smuggled migrants may have been subject to human rights abuse during the journey, at the border crossing, during periods of illegal stay in the destination country, in detention facilities or during the course of removal. Smuggled migrants, regardless of their immigration status, have the right to have their human rights and dignity upheld and prioritized at all stages by those who deal with their case from discovery and identification, to detention, to removal—where such cases permit—to the granting of asylum.

A Comprehensive Policy Response to Human Trafficking

A comprehensive and multi-disciplinary approach comprising and balancing repressive strategies is needed in order to effectively tackle the issue of human trafficking, suppressing the organized crime networks and prosecuting the traffickers, as well as empowering potential and actual victims of trafficking. A comprehensive policy response should begin with prevention to help combat trafficking; provide protection and support for the victims and ensure that traffickers are prosecuted. Effective action against trafficking in persons must

take into account the recognition and promotion of the rights of victims of trafficking.

Prevention is Key to the Anti-Trafficking Response

Preventive measures to fight trafficking in persons should be multi-disciplinary, address all root causes of trafficking, including both supply and demand side and foster opportunities to migrate legally and safely. The main goal of prevention mechanisms is the reduction of vulnerability to trafficking and the increase in livelihood options for individuals at risk, with special focus on women and children. There is an urgent need to address issues of human rights violations in countries of origin to prevent vulnerability.

Governments should train local and national authorities and sensitize the public at large to promote understanding of human trafficking and take action against it. It is essential to raise the awareness of potential and actual victims, warn of the risks and dangers of trafficking and inform about legal and safe migration channels. On the supply side, measures should include the empowerment of persons at risk, and include efforts to spur socio-economic development, employment generation, gender-equality, and anti-discrimination measures. States should foster stronger links between antitrafficking measures and existing national action plans, particularly national employment plans, development plans, child protection plans, gender equality plans and national migration plans.

Local community development, socio-economic development and employment generation schemes as well as micro-credit schemes are often not accessible to women. Such schemes should actively target women and other vulnerable groups at risks of being trafficked and returned trafficked victims, so as to support their social and economic reintegration. If legal and safe migration channels would be available as an alternative to irregular migration, the dependency of migrants on the abusive intermediary network would decrease. Therefore, stronger cooperation between countries of origin, transit and destination is essential. In order to prevent abuse, authorities should monitor the practices of

licensed recruiters. On the demand side, it is essential to reduce the need for cheap exploitative labour in all sectors in countries of destination. Victims are trafficked mostly into the unprotected, unregulated, informal sectors of the destination economies. Even if legal migratory channels are enhanced, these will most likely not target the informal sector. Countries of destination should take a standardsbased approach to trafficking and migration in order to foster migrants' rights and migrant workers' rights both for the formal and informal sectors of the economy.

They should furthermore ensure the enforcement of these labour and protection standards and promote measures to address the protection of the rights of workers in the informal sector. This calls for collaboration with trade unions, migrant associations and employers.

Protection and Support for Trafficked Victims

Victim protection and support schemes are an essential element of a comprehensive and effective response to human trafficking. Trafficked victims need safety, support and care while undergoing social and economic reintegration once their distress has ended. They require protection from further exploitation and access to medical and psychological care, including voluntary and confidential counseling. Victims should be given access to confidential HIV testing on a voluntary basis. Where victims are given the opportunity to recover from their trafficking ordeal with professional support, they are more likely to cooperate in the criminal investigation and provide evidence against their traffickers. Effectively responding to human trafficking therefore requires a balanced approach that is based on enforcing the law against the traffickers and protecting the human rights of trafficked victims.

It should be the victim's right to access protection and support services on an unconditional basis. Despite an increased awareness of the need to identify trafficked persons as victims of crime and also of the human rights violations suffered by those who are trafficked, many States have yet to

establish effective victim protection and support mechanisms. The challenge for national authorities is to protect the rights of migrants while maintaining border security. While States have the right to detain and remove irregular migrants, they have the responsibility to do so using measures which respect human rights and the safety and dignity of the individual.

States also have a role to play in reducing the causes of involuntary migration through greater rights protections in home countries. Situations of poverty, lack of access to education, gender inequality and high unemployment make people vulnerable to irregular migration. Many States view human trafficking and migrant smuggling as a 'victimless' crime which impacts on the security of a State and this prevents adequate protection of the human rights of trafficked and/ or smuggled persons.

Prosecution

International cooperation is essential to uncover and combat transnational trafficking networks. Traffickers must be brought to justice. Governments should effectively investigate, prosecute and adjudicate trafficking, including its component acts and related conduct, whether committed by governmental or by non-State actors. It is essential to ensure that trafficking, its component acts and related offences constitute offences under national law and extradition treaties. Perpetrators, including those who recruit and harbor trafficked persons, must be prosecuted and their assets confiscated.

Employers who hire trafficked persons should be punished. While countries are stepping up their efforts to crack down on trafficking, challenges remain, including inadequate data, lack of government programmes, corruption and resilience of criminal syndicates that frequently change tactics and utilize legal businesses and mechanisms as fronts.

The Capacities of Criminal Justice and Law Enforcement to Respond to Trafficking in Persons and Smuggling of Migrants

Although combating human trafficking appears to be high

on the agenda of Member States, it is evident that even with legislation in place, many national law enforcement and criminal justice practitioners do not have the necessary knowledge, expertise or capacity to fight trafficking in persons in an effective and multi-dimensional manner, including responding to the human rights aspect of the crime. It is essential that the professional skills of law enforcement and criminal justice practitioners be developed through education and training to specifically and effectively respond to this crime not only through law enforcement, but also by addressing human rights violations suffered by trafficked victims.

The response capacity of States is even more limited with respect to the smuggling of migrants. Law enforcement efforts are often limited to border controls without being embedded in a wider comprehensive policy framework. Smuggled migrants often end up in detention centres, jail or face deportation because of their illegal status. There is little regard or concern displayed towards the human rights abuses they may have suffered during their journey or for the protection of their human rights in the destination country. It has been increasingly reported that human rights of irregular migrants in detention and jail facilities are often not respected or upheld. For countries of origin, offering pre-departure training for migrants and informing the public about the dangers of human trafficking is considered good practice. So is proactive consular outreach and assistance, including through the posting of trained labour attachés. During the discussions on migration and development leading up to the High Level Dialogue on Migration and Development, it was stressed that migrants must assume their share of responsibility by being informed and aware of the impact of their personal (or communal) decision to migrate. Migrants themselves are expected to seek information about the risks of migration.

They are not just held co-responsible for their own security. Migrants are also seen as having an active role to play in their successful integration, which often entails learning the language of the host society and knowing one's rights and responsibilities.

In 2007 the Global Initiative to Fight International Human Trafficking (UN.GIFT) was launched by the United Nations Office on Drugs and Crime (UNODC) to raise awareness among business leaders of the need to effectively manage and monitor global supply chains. The Global Initiative is based on a simple principle: human trafficking is a crime of such magnitude and atrocity that it cannot be dealt with successfully by any government alone. In addition, information campaigns targeting shareholders and consumers are being discussed as a means to encourage them to use their leverage and provide companies with stronger incentives to comply with labour rights standards.

Migrants in Detention

Migrants, especially irregular migrants who lack legal status and migrants who are victims of smuggling and trafficking, are particularly vulnerable to detention, restriction on their freedom of movement or deprivation of their liberty, usually through enforced confinement, either in the receiving country or during transit (by land or sea).

The most frequent violations and abuses suffered by migrants in detention are identified, based on the information provided in the recent reports of the Special Rapporteur on the Rights of Migrants. Administrative measures of detention are undertaken often without regard for the individual status of the migrant.

The various challenges can be grouped under two main categories including:

1. The legislative framework of protection mechanisms of migrants in detention.
2. The conditions of migrants kept in detention.

"Deprivation of liberty of migrants must comply not only with national law, but also with international legislation. It is a fundamental principle of international law that no one should be subjected to arbitrary detention. International human rights norms, principles and standards apply to all individuals, including migrants and asylum-seekers, and to both criminal and administrative proceedings."

Irregular migrants are particularly vulnerable to deprivation of liberty both in the context of criminal and administrative proceedings. In some cases, national immigration regulations criminalize and punish in an attempt to discourage irregular migration.

Irregular migrants therefore become particularly vulnerable to criminal detention for such reasons as irregularly crossing international borders, using false identification, overstaying their visas, irregular stay or leaving their residence without authorization. “Victims of trafficking and smuggling commit infractions or offences, such as irregular entry, use of false documents and other violations of immigration laws and regulations, which make them liable to detention.

The law of some countries punishes as criminal offences or administrative infractions irregular entry, entry without valid documents or engaging in prostitution, including forced prostitution. Victims of trafficking are thus often detained and deported without regard for their victimization and without consideration for the risks they may be exposed to if returned to their country of origin.” The Working Group on Arbitrary Detention holds the view that criminalizing the irregular entry into a country exceeds the legitimate interest of States to control and regulate irregular immigration and can lead to unnecessary detention.

Moreover, irregular migrants detained for immigration offenses considered a criminal offense by the receiving State should be given the opportunity to appeal before an independent judiciary, but are not afforded such protection in practice. In such cases, detention of migrants may become arbitrary. In international and regional human rights law, arbitrary arrest and detention is expressly prohibited and migrants’ nationality or lack of legal status in the destination country cannot excuse States from their obligations under international law to ensure due process guarantees and dignified and humane treatment while migrants are held in detention. Despite these standards, the Special Rapporteur has received numerous reports that in certain cases detention can become prolonged and the detainees subject to ill-treatment.

Migrants in detention often face increased risk of physical or sexual abuse and violation. Differences exist between immigration regulations among States, making oversight of detention conditions and States' adherence to international standards in this practice a challenge. Some States entirely lack a legal regime governing immigration and asylum procedures that, when in place, can help to manage detention practices. Others have enacted immigration laws but often do not provide for a legal framework for detention.

Some States have legislation which provides for a maximum period of detention, whereas others lack a time limit. With such diversity in national policy and law governing detention and expulsion, it is important that irregular migration is seen as an administrative offense and irregular migrants processed on an individual basis. Where possible, detention should be used only as a last resort and in general irregular migrants should not be treated as criminals.

Migrants are often not informed of their rights to appeal and of the status of their situation. If detention centres do not provide for judicial review of administrative detention of migrants, the lack of awareness of the right to appeal and the lack of access to free legal counsel may prevent migrants from exercising their rights in practice. Even in the presence of legitimate claims, the difficulty of receiving assistance impedes the exercise of the rights of the migrant in detention. Moreover, incidents in which detainees are not informed about their rights and status of detention, in a language they understand, have been repeatedly reported. When lawyers and interpreters are not available, migrants in detention may feel intimidated by immigration officers and obliged to sign documents without understanding their implications. Migrants and asylum-seekers are sometimes detained at airport transit zones and other points of entry, under no clear authority, either with the knowledge of government officials at the airport or simply on the instructions of airline companies before being returned to their countries.

The difficulty or impossibility of reaching any outside assistance impedes the exercise of the right of the persons

concerned to challenge the lawfulness of the State's decision to be detained and returned and to apply for asylum, even in the presence of legitimate claims. In practice, some States misleadingly label migrant detention centres as "transit centres" or "guest houses" and "detention" as "retention" in the absence of legislation authorizing deprivation of liberty. Foreign nationals can be detained if immigration officers have reasonable grounds to believe that the migrant is inadmissible, a danger to the national public, unlikely to appear for future examinations etc. "The failure to provide legal criteria can result in *de facto* discriminatory patterns of arrest and deportation of irregular migrants.

At times migration authorities stop migrants at the border and take them arbitrarily to the police station where they are asked for money or sexual favours in exchange for their release. Cases of prolonged detention because of refusal to pay were reported." Migrants belonging to certain ethnic groups or nationalities are more likely to be intercepted and detained than others. The absence of internal monitoring and external inspection mechanisms in detention centres gives rise to abuse and violence.

Often no particular provisions exist regarding detention of children or other vulnerable groups such as women and irregular migrants, which gives rise to the violation of basic human rights. Irregular migrants in detention often do not receive legal, medical, social or psychological assistance and protection. "Migrants sentenced to imprisonment for immigration offences are detained with common criminals and subjected to the same punitive regime; they are not always separated from the rest of the prison population and have difficulties in understanding and communicating... There are often no arrangements to provide culturally appropriate foods and to allow them to practise their faiths. Racist attacks against migrants detained with common prisoners were also reported [by the Special Rapporteur on the Rights of Migrants]. Prison personnel in most of the cases do not receive specific training on how to deal with foreign detainees." The poor conditions of certain detention centres lead to serious deterioration in

the living standards of foreign nationals, including inadequate access to medical treatment and other services, poor hygienic conditions, the absence of separated space for men and women, and adults from minors etc. Furthermore, freedom of movement is limited within the detention facility.

MIGRATION, GLOBALIZATION AND THE RIGHT TO DEVELOPMENT

Globalization: Setting the Stage for Easier and Faster Circulation of People

Migration is among the constants in the history of mankind. People have moved either to explore new horizons, for survival or in search of better means of livelihood, or were forced to move because of persecution. With globalization came expanded market opportunities and more affordable and accessible communications and transportation facilities. This meant ease in the flow and transfer of factor endowments, including people. Globalization has thus set the stage for the easier and faster circulation of people but such mobility could either be facilitated or hampered by a country's unilateral policies, bilateral agreements, regional and multilateral arrangements.

The existing need of many developed and developing countries for foreign labour is a reality, primarily due to their ageing populations and the absence or lack of locals or nationals to fill key occupations. Despite this need, many countries remain conservative in opening up their markets for foreign workers. The approach taken by most countries in need of migrant labour is that of "cautious, selective opening-up", either through unilateral policies or bilateral arrangements that allow them to choose specific countries and occupational groups to access their labour markets for a specified duration or on a seasonal basis.

Commitments to facilitate the entry and stay of foreign personnel for work or provision of service remain very limited at the regional and multilateral fora. This is despite the fact that, from the trade perspective, liberalizing the movement of labour was estimated to bring global welfare gains of US$ 356

billion, with benefits accruing both to labour sending and labour receiving countries. If the share of foreign workers grew to three per cent of the labour force of rich countries it would involve an increase of 14 million people over 25 years (roughly 500,000 a year). The global gains would therefore be US$ 675 billion a year by 2025.

For the labour sending countries, tapping one of their comparative advantages, *i.e.*, abundant labour supply helps ease unemployment pressures at home, siphons in additional resources for the economy through remittances, ushers in improvements in human capital and allows the economy to benefit from technology and skills transfer and investments from returning workers. On a more macro level, remittances to developing countries estimated at US$251 billion in 2007, are a significant source of foreign exchange for these countries and have been associated with reduction in poverty, improvements in school attendance, better health care practices and gender empowerment.

Migrant remittances provide a safety net to migrant households in times of hardship and contribute to the stability of recipient economies. Remittances, however, remain private small transfers and cannot replace official development assistance of large public flows. Remittances do not lessen the responsibility of the receiving government to put in place adequate social protection mechanisms. Migrants contribute to the development of their countries of origin through remittance flows, investment and business ventures, and skills and technology transfer.

As migration affects the development of both sending and receiving countries, codevelopment initiatives should be scaled up and should include projects such as:

- Effective monitoring of migration flows with the eventual aim of ensuring return or facilitating circular migration,
- Supporting migrants and diaspora communities' linkups and investment interests with their communities of origin,
- Setting-up training institutions and other

infrastructure for human resource replenishment so that they may contribute to development, and

- Adopting ethical recruitment policies, among others. Co-development mechanisms between migrant-sending and migrant-receiving countries could encourage the progressive realization of the right to remain in the country of origin through the improvement of economic, social, and cultural conditions in the countries of origin.

Article 2 of the International Covenant on Economic, Social and Cultural Rights on inter-state cooperation underlies this approach. Migrants are important vehicles for transmitting "social remittances" including new ideas, products, information and technology. Migrants can also make use of enhanced skills and knowledge acquired abroad once they return to their countries of origin.

For labour receiving countries, foreign workers fill in shortages of key personnel for the efficient production of goods and services and, more importantly, for the provision of health, education and Focusing on the Economic Dimensions of Migration and Remittances The World Bank focuses largely on the economic dimensions of migration and remittances from a development perspective.

The Bank's work on the development aspects has implications for migrants' rights, especially the right of migrants and their families back home to a decent livelihood, to have access to education and health care, and to be free from hunger and poverty. The Bank plays a global advocacy role in providing evidence-based analysis of the gains of migration for migrants, as well as the countries of origin and destination.

The Bank's flagship Global Development Finance 2003 report, Global Economic Prospects 2006 report and other publications have highlighted the size and importance of migrant remittances and their beneficial role in reducing poverty and enhancing child health, education and small business investments Migrant remittances The World Bank focuses largely on the economic dimensions of migration and

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All of these have key implications for efficiency and productivity of the economy and essential services delivery. The World Trade Organization (WTO) provides an avenue for facilitating the movement of service providers on a temporary basis through the General Agreement on Trade in Services (GATS) or Mode 4 in the GATS parlance. The GATS Mode 4 of supply of services (presence of natural persons) describes the process by which an individual moves to the economy of consumer to provide a certain service, whether on his/her own behalf or on behalf of his/ her employer. Through a schedule of commitments, WTO members specify categories of service providers or employees of service providers that are granted access into their territories.

Given that Mode 4 covers only a small subset of migration and that present commitments are limited mostly to movement of intra-corporate transferees, business visitors and highly-skilled professionals, most labour movements still occur outside the multilateral context. Some developing and least-developed countries, stressing Mode 4 as among the modes of export interest to them, have continually sought for the expansion of commitments by major destination countries in occupations

and skill sets that are of interest to them, including movement of contractual service suppliers and independent service suppliers at all skill levels.

At the regional level, regional and subregional free trade agreements also include provisions facilitating the movement of people, but as at the multilateral level, these, too, are beset with challenges. The Southern African Development Community (SADC), has signed a new Protocol on the 'Facilitation of Movement of Persons in SADC' aimed at enabling the movement of people to other countries in the region. The Protocol, which is subject to ratification in order to take effect, has the objective of facilitating: the entry into a Member State without the need for a visa for a maximum period of 90 days per year for a bona fide visit and in accordance with the laws of the Member State; permanent and temporary residence in the territory of another Member State; and working in the territory of another Member State.

The experience of countries implementing bilateral mobility agreements provides examples of best practices for improving the development potential of migration, including the realization of economic, social, cultural, civil and political rights, and access to justice. The international community is increasingly conscious of the need to take a holistic view of migration—one that goes beyond a purely economic or security perspective to also incorporate the social and cultural aspects of this global phenomenon—if the problems related to today's migration flows are to be addressed effectively and humanely. Cooperation between countries of origin, transit and destination is critical for guaranteeing the protection of migrants' rights and minimizing the potential negative impact of migration for the long-term development of the country of origin. As the adoption of the Protocol is linked with the intricacies of the process of removing border control, allowing people to freely settle and obtain jobs where they want remains a far-fetched reality.

Migration and Development Linkages

Every human being has the intrinsic right and desire to

improve his/her living conditions, including through search for better livelihood opportunities within and outside his/her country of birth. The deprivation of the human right to development is one of the causes of migration itself. The International Convention on Economic Social and Cultural Rights recognizes the right to work, including the right of everyone to the opportunity to gain a living by work which he/she freely chooses and accepts, as well as the enjoyment of just and favourable conditions of work, and the continuous improvement of living conditions.

Every country has the right to development, and the more developed among them have the moral responsibility to help the developing and least developed countries achieve their development objectives. The mandate to promote the development of all persons becomes clear from Article 22 of the Universal Declaration of Human Rights: "Everyone as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

The Declaration on the Right to Development confirms that "the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations." Thus, "steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and the implementation of policy, legislative and other measures at the national and international levels." The Declaration further asserts that: "States have primary responsibility for the creation of national and international conditions favourable to the realization of the right to development."

It also places the human being at the centre of a development process respectful of human rights. Models of economic development which create structural inequality promote irregular migration and place the human rights of

millions of people at risk. The 1994 International Conference on Population and Development (ICPD) Programme of Action and the 1999 Bangkok Declaration on Irregular Migration draw conceptual connections between migration and development and urge States which receive irregular migration to aid developing countries and countries with economies in transition to reduce irregular migration through programmes which address poverty reduction, social development, and the achievement of sustained economic growth.

The human rights to civil and political participation are integral to the democratic development of public policies which protect economic, social, and cultural rights. "The forms of political organization and participation in decision-making processes that exist in different societies are closely linked with the degree of equity obtaining there. If socioeconomic inequalities are acute, vast sectors of the population will find that the aspiration of exercising their rights as nationals is a virtually unattainable one. Exacerbation of tensions resulting from socio-political exclusion tends to lead to various forms of instability and violence, which generally result in forced movements of population." Effective development policies can reduce the need to migrate.

Human rights can guide the development of linked migration and development policy initiatives at the national, regional, and international level. "Many less-developed countries have identified labour export as important in reducing unemployment, improving the balance of payments, securing skills and investment capital, and stimulating development." The overall objective is to avoid migration as a matter of necessity by promoting positive human development outcomes and economic opportunities in developing countries.

At the same time, it is recognized that under certain circumstances migration can contribute to development through remittances, the acquisition of skills by migrants, and the promotion of entrepreneurship in the country of origin through specific programmes assisting migrants to re-integrate in their home country. Specific mechanisms and ethical recruitment may address issues of brain drain. A thin semantic

line often separates commitments to support migrants in their efforts to promote development, and formulations that come close to suggesting their instrumentalization for the purpose of ensuring mutually agreeable and beneficial arrangements among States. Linking the question of international migration to the issue of development has opened up new avenues for dialogue and collaboration among governments, revolving around the identification of mutual interests and the creation of "win-win" situations.

While it is important to capitalize on the current political momentum, those supporting and driving this process should be mindful of avoiding inconsistencies in the migration and development discourse with regard to human rights. A case in point is the often made argument that the protection of migrants' rights will enhance the development gains to be reaped from migration. To quote Mary Robinson, former United Nations High Commissioner for Human Rights: "Respect for migrants' rights actually contributes to economic and social development in sending and receiving countries.

Migrants who have opportunities for decent and legal work contribute more to development than those who are exploited." Human rights–and the rights-holders–should not be portrayed as means to an end. It should not be implied that migrants are obliged to "pay back"–by contributing to development–for being treated decently. While States should assume responsibility for providing an enabling and empowering environment for migrants, a human rights-based approach implies that they must not patronize them in the exercise of their talents and initiative, and the use of their funds. The most effective way of ensuring this may be an honest commitment to including all groups of migrants in participatory consultations and decision-making processes on international migration and development.

The international community works at large to promote development, reduce poverty and achieve the Millennium Development Goals (MDGs): poverty reduction, promoting education, improving maternal health, promoting gender equality, reducing child mortality, combating HIV/AIDS,

malaria and other diseases, ensuring environmental sustainability and developing a global partnership for development. Although the link between migration and development is increasingly recognized, the relationship between migration and the Millennium Development Goals has not been adequately explored. Studies have pointed to migration's positive impact in realizing some of the MDGs.

Remittances have directly benefited poor households in many countries with the money sent by relatives working abroad making daily subsistence affordable and access to health and educational services and amenities such as appropriate housing, electricity, water, sanitation more readily realizable for families left behind. Women migrants also benefit from improvements in skills and education and equality in household decision-making. While migration could be a positive factor for development and the advancement of the rights to livelihood and development, it is likewise acknowledged that many migrants can be exposed and subject to conditions that deny them some rights, including those relating to their conditions at work and the upholding of their dignity.

In most instances, it is the women and the less-skilled who are most vulnerable. Information is rife on abuses committed by employers of domestic women workers, especially those who are hired as temporary contract workers, or those who are undocumented. For low-skilled women, the incidence of abuse is striking, with some of them being treated like slaves and prisoners, subjected to physical, emotional, psychological and sexual abuse. One trap for the current human rights discourse on migration is to regard and promote human rights as the reserve of the vulnerable. Indeed, most discussions on human rights pertain to weak members of migration movements: female migrants, lower-skilled migrant workers and the undocumented, who often occupy so called "3 D work" (difficult, dirty, dangerous); as well as victims of trafficking, especially women and children.

While it is undisputable that all these groups are entitled to and in need of human rights protection, it is also important to note that their vulnerability is not a fact of nature, but the

result of social, cultural, economic and political factors that need to be addressed, including: inequalities, marginalization, lack of access to resources and information, lack of knowledge and skills, limited or no involvement in decision making. Most importantly, it is the lack of voice of "the vulnerable" that cannot be remedied by focusing attention and efforts on protection alone, without pressing for greater representation and participation at the same time.

A holistic approach which applies human rights standards to both the fundamental causes and impacts of irregular migration may, in the long run, reduce the human rights violations against irregular migrants by reducing their desperation and vulnerability.

As such, a human rights approach to migration and development can form part of a set of strategies to ensure the dynamism, flexibility, and competitiveness of the economies of host and sending countries, thus fostering the positive effects of migration for host societies and countries of origin.

A human rights approach to migration will not only help to develop economic opportunities or guide the integration of migration, but also ensure that the concerns of the most vulnerable in a receiving society are addressed and the benefits of migration equitably shared. Emphasizing State responsibility *for the promotion of economic, social, and cultural rights ab* initio may recast development policies in a way that would limit emigration, taking on issues beyond the capacity of migrants themselves to fund development in their countries of origin. More work is needed to implement the goals of the 1986 United Nations Declaration on the Right to Development. "States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals."

Countries of origin may also be impacted by the migration of their nationals, especially those who provide essential services, such as health and education. Such migration often leads to "brain drain"—the migration of the best and brightest—resulting in inadequate service provision at home.

Examples of brain drain have been highlighted in many African countries, particularly the flight of medical practitioners and health-care personnel.

The Impact of Climate Change on Migration

Environmental factors have long had an impact on global migration flows. The scale of such flows, both internal and cross border, is expected to rise over the next decades as a result of gradual deterioration of environmental conditions and anthropogenic, or man-made, climate change and its effects. Both gradual environmental change and extreme environmental events influence population migration patterns but in different ways.

The Intergovernmental Panel on Climate Change (IPCC) Fourth Assessment report identified the following more specific climate change impacts that have potential for triggering or increasing population migration: increases in the areas affected by droughts, increased tropical cyclone activity both in frequency and intensity, increased incidence of rising sea level (excludes tsunamis) and increased climate variability. These environmental changes will occur slowly over a long period of time with small but cumulative manifestations.

While predictions of the number, characteristics and location of people who would be forced or choose to migrate as a result of these processes still need to be refined using new methodologies to estimate flows, figures will be on the increase, with millions more vulnerable people on the move. Gradual forms of environmental change may most acutely affect those depending directly on fragile ecosystems to sustain farming, fishing and similar livelihoods. People affected by these changes endeavor to adapt through various measures, one of which being migration.

Environmentally induced migration flows can often be of temporary or seasonal nature, with migrants trying to diversify their risks against declining local earnings without cutting off ties with their communities at home. In some cases, entire households migrate abroad temporarily waiting for improvement in environmental conditions at home. In other

situations, some household members migrate, sending remittances to sustain basic standards of living, while others stay behind caring for local assets and livelihood means. However, if local areas become uninhabitable and the environmental degradation irreversible, then migration can become long-term or even permanent.

This scenario poses two challenges. First, there exists the need to better determine where to draw the line between voluntary and forced migration by better defining the tipping point. Second, persons forcibly displaced across international borders remain without any specific protection today as they do not qualify as refugees or any other category under special protection of present international law. Predicting the impact of gradual deterioration in environmental conditions on migration patterns is complicated by a variety of factors that are part of the decision making process to migrate, including economic, social, cultural, civil and political factors and how they interact at the individual, household, community and national levels.

Baseline data are needed to analyse the phenomenon of environmentally induced migration, develop conceptual and methodological tools to model different migration scenarios and formulate appropriate policies to ensure that the human rights of migrants are protected. Within the scope of other efforts aimed at improving the quality and availability of census and survey information, quantifying and locating vulnerable populations is undoubtedly a priority.

Health and Migration

Health and migration are linked and interdependent. Indeed, many of the same disparities that drive the global spread of disease also drive migration. That is not to say that movement should be stopped, but rather that the health implications have to be managed. Governments are increasingly recognizing the need for a comprehensive approach to migration health that goes beyond infectious diseases and border control to include migration related health vulnerabilities, communicable diseases, mental health,

occupational health, health implications of climate change as well as access to health care and human rights issues. With more people travelling faster and to more destinations, migration health is today a major public health concern.

The re-emergence of tuberculosis in developed parts of the world, the rapid spread of HIV (Human Immunodeficiency Virus) and SARS (Severe Acute Respiratory Syndrome) are only a few examples of the critical relationship between population mobility and health. While migration itself is not, under normal circumstances, a risk to health, conditions surrounding the migration process can increase vulnerability for ill health. Some of the health risk factors are related to the circumstance before departure. Migrants depart with health profiles which have been influenced by their socio-economic status and accessibility to health-care services in their communities of origin. For instance, migrants who are fleeing poverty or conflict are likely less healthy than migrants who move by choice.

The health of migrants is also affected by the conditions surrounding their movement. Irregular migrants, trafficked and smuggled persons as well as those forced to move because of natural or man-made disasters, are most vulnerable to poor health conditions, violence and lack of access to adequate health care during the migration process. Risk factors upon destination are often related to the legal status of migrants, which too frequently determines the level of access to health and social service. Further factors defining vulnerability to ill health and risk behaviours are stigma, discrimination and linguistic and cultural barriers. Finally, the return of migrants to their place of origin may imply returning to a location with high disease prevalence compared to the place where the migrant resided temporarily, or it may imply introduction of health conditions acquired during the migration process, into the home community.

The implications of migrant health extend well beyond the migrants themselves. Indeed, there are important public health considerations for the entire society. Inadequate attention to health in the migrant community will be felt sooner or later by society at large. In that sense, well managed

migration health promotes the well being of all, protects global public health, and can facilitate integration and contribute to social and economic development. The need for coordinated and sustained action to address migration related health challenges was addressed at the World Health Assembly of the World Health Organization (WHO) in May 2008. A Resolution on Migrant Health was adopted by the WHO Member States.

The resolution, which promotes equitable access to health services without discrimination on the basis of gender, age, religion, nationality or race, urges Member States, WHO and its partners to promote the inclusion of migrant's health in regional health strategies; to develop/support assessments and studies and share best practices; to strengthen the capacity of service providers and health professionals to respond to migrant needs; to engage in bilateral and multilateral cooperation; and to establish a technical network to further research and enhance the capacity to cooperate. Migrants have inalienable rights that States have an obligation to uphold.

The right of everyone to enjoy the highest attainable standard of physical and mental health is an inherent human right as recognized in major human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the International Convention on the Elimination of All Forms of Racial Discrimination, among others. Programming success often relies on empowering individuals to discuss issues that concern them and to claim their rights to life, health, information, freedom from discrimination, and to be part of the social and economic life in the countries of destination.

Addressing the stigma associated with disease and infection, for instance HIV, and bringing the issue into the public sphere are critical to protecting the rights of those affected. Programmes must be designed with participation of the people (rights holders) they are intended to serve, and must

have clear-cut strategies to be inclusive at all levels, from national plans to community-led interventions. In addition, legal mechanisms should be established or reinforced to ensure compliance of the different duty bearers (governments, service providers, community leaders) to meet their responsibilities to people affected. Although the Joint United Nations Programme on HIV/AIDS (UNAIDS), IOM and WHO have stated that there is no public health rational for limiting the freedom of movement of people living with HIV, some 67 countries deny the entry, stay or residence of HIV-positive non-nationals in their countries. Labour migrants often bear the brunt of such restrictions as they are often subject to mandatory testing of HIV without free and informed consent, and respect for confidentiality.

Concretizing the Right to Development through Migration

The challenge centres on how to manage the migration and development nexus in a holistic manner so that it becomes more a positive factor of economic and human development benefitting not just one segment of the population but the majority. Migration policies must be linked to development policies and *vice versa* and should be seen as complementing each other. The level of development of both sending and receiving countries plays a role in migration decisions. For the sending country, the level of economic development defines the types of movements, length of stay, disposition to overstay or enter a country without proper documentation. Receiving countries, in general, attract migrants from countries where there are less opportunities of earning a decent living at home.

While countries of origin and destination have specific obligations with respect to the migrant, gains from migration are maximized and costs minimized if sending and receiving countries cooperate in the following areas, *inter alia*,: mitigating brain drain through human resource training and capacity-building (*e.g.,* retraining and education programmes, twinning arrangements and exchange of experts), facilitating return migration (*e.g.,* by providing incentives and possibilities

for lucrative investments, offering preferential interest rates on savings, transfer pension or social security contributions to the home country to be collected by the migrant upon return, providing other social benefits such as educational and health insurance grants, allowing for return and circular migration) and adopting ethical recruitment policies to discipline recruitment of personnel in occupations with shortages such as health and education; maximizing the benefits from remittances through facilitating and supporting co-development projects, including encouraging entrepreneurship and small-scale businesses, addressing problems of corruption and the lack of access to credit; addressing protection of migrants and the promotion of their rights, most notably of women and the less skilled who are most vulnerable.

For sending countries, it is important to distribute the benefits of migration, including by improving essential services delivery and access to basic services such as education and health, supporting agricultural infrastructure and other forms of assistance, investing in infrastructure and technological development to better utilize migrants' contributions to the economy including their acquired knowledge and training. In all these efforts, it is important that migrant-receiving governments provide support as well.

Such efforts need coherent migration management—a management that looks at migration throughout the migration life cycle (*i.e.,* pre-, during- and post-migration) and that involves the sending and receiving governments and other stakeholders, including the migrant and the employers, and international and nongovernmental organizations through codevelopment and solidarity frameworks. Effective and coherent migration management is key to ensuring that a balance is achieved in the attainment of development and socio-economic goals. The longterm goal should be to generate adequate employment and sustainable economic growth so that migration becomes a matter of choice rather than a necessity.

Making Migration Work for Development

The United Nations has put the debate on international

migration and development on the international agenda through the convening in 2006 of the High Level Dialogue on International Migration and Development. That meeting ushered in the reinvigoration and the expansion of the Global Migration Group and the holding of the Global Forum on Migration and Development to explore further ways of strengthening the commitment for genuine and effective international cooperation on the issue of migration and development.

In 2007, a resolution on international migration and development adopted by consensus by the General Assembly, called upon relevant United Nations bodies, other intergovernmental, regional and sub-regional organizations, "to continue to address the issue of migration and development with a view to integrating migration issues,... within the broader context of the implementation of internationally agreed development goals, including the Millennium Development Goals and respect for human rights." A "triple win" situation is possible. First of all, there is a need to treat migration and development in a comprehensive manner to ensure that the human and socioeconomic development and dimensions are embedded in migration policy.

This requires putting in place policies and setting up institutions that would play a role in each stage of the migration process, *i.e.,* pre-, during and post-migration—from preparing and informing the migrants of their rights and where they could get assistance in their area of destination to putting in place mechanisms to maximize the benefits from remittances (including by channeling them into more productive uses) and minimizing the costs of remittance transfers. In all these, there are roles that the sending and receiving governments could play, either individually or jointly, but always in coordination with each other.

Furthermore, it is important to ensure policy coherence and explicit understanding nationally that migration policy should form part of an over-all development strategy and that migration should be considered as just one means towards attaining and realizing development goals but not as a goal in

itself. For countries of origin, this means making labour mobility part of their development strategies relating to labour, employment, trade and human resource development policy. Coherence also requires aligning migration policies with the realization of human rights and socio-economic development goals.

This means, inter alia:

- Crafting appropriate policies and incentives, including devising a concrete government plan and establishing institutions and offices to handle migration, labour and employment policies in a holistic manner ensuring the protection of the human rights of migrants,
- Advocating for better working conditions and addressing social protection (especially of less-skilled women who are most vulnerable), xenophobia and social marginalization through information dissemination and awarenessraising as part of the pre-departure orientation programme or through migrant resource centres and representations in major destination countries,
- Setting-up databases to maintain links and networks to allow migrants to be updated regarding the opportunities at home, and
- Putting in place mechanisms to maximize the benefits and minimize the costs of migration.

The sensitivities of countries of destination regarding the acceptance of foreign workers that overstay are understandable. Effective migration management by both sending and receiving countries is a preferred option rather than barring migration altogether, given the complementary needs of sending and receiving countries when it comes to labour mobility.

Effective migration management takes into account a mix of incentives and penalties including putting in place incentives to facilitate return, such as financial return incentives, re-entry programmes, investment incentives that provide grants and subsidies, low-interest loans, tax breaks, entrepreneurship training, housing and educational subsidies, etc. and imposing mechanisms to discourage overstaying such as posting financial

security bonds, mandatory savings schemes or pension contributions to be collected upon return, strict enforcement of laws on employers and migrants, etc. to discourage overstay.

Ultimately, it is imperative for countries of origin to set the stage to facilitate return by building a stable political and economic environment at home. Mechanisms should be put in place to allow for the possibility of return/re-entry, include appropriate duration of stay, make (temporary) return attractive, *e.g.,* by allowing migrants to engage in productive activities and providing possibilities for the utilization of their acquired knowledge and training, including technology, at home. The sending and receiving country governments could pool some "transit migrants or circular migrants" funds (from contributions from beneficiaries of migration–governments, migrants, employers) to serve as seed money for any activity that would contribute to ensuring circular or return migration and/ or other pro-development projects.

In order to maximize development impacts, it is imperative to have meaningful commitments in liberalization efforts at the unilateral, bilateral, regional and multilateral levels and at different skill levels or occupation groups. Often, destination countries institute unilateral policies for specific occupations with vacancies and target source countries to fill the shortages or enter into bilateral arrangements, again with specific terms and obligations for countries of destination and origin. While such arrangements facilitate access, they do so only for some chosen occupations and are afforded only to select countries. Thus they lack the predictability of access which is important for developing and least developed countries, whose comparative advantage is their abundant labour. Such schemes are also vehicles for abuse of workers.

It is therefore imperative to devise a framework involving both sending and receiving governments and other stakeholders that would enable the migration community to operate in an environment of comfort and where migration could take place in an orderly manner and under mutually-acceptable conditions. Thus, it is important that demands of developing and least developed countries for better and more

predictable access of their service personnel/workers be reflected in commitments at the multilateral level as well as in regional integration frameworks. In this regard, it is important to further explore how GATS Mode 4 commitments at the World Trade Organization (WTO) could be made more meaningful.

Among the proposals made to facilitate market access in the on-going GATS negotiations at the WTO include: undertaking broader commitments to cover skill sets demanded by sending countries including those de-linked from commercial presence, removal or substantial reduction of economic or labour market needs tests which serve as discretionary barriers to entry, specification of the duration of stay and providing for possibilities of renewal. Requests have *also been made for alternative assessment of qualifications i.e.,* demonstrated competence in lieu of university degrees and for more basic verification of skills and competence in the absence of mutual recognition arrangements (MRAs).

Some WTO members have also suggested greater transparency of regulations and administrative procedures, including sources of information/ contact points relating to the movement of service suppliers and for these to be included as additional commitments in the countries' schedule of commitments. Regional North-South arrangements could also serve as vehicles to market openness as in the context of the economic partnership agreements (EPAs). As there has been an observed trend towards "cautiousness" on the part of receiving countries towards market opening, there is a need to cushion their "fears" and veer away from protectionism by raising awareness of the costs and benefits of migration through sustained dialogue among key stakeholders, including between labour and global enterprises. Results of such dialogue must be communicated to the general public to assuage negative sentiments regarding migration and to policymakers to base migration-related policies on facts.

In this light, there is a need to sensitize receiving country constituents regarding the development impacts of migration and awareness that migration is not a one-way street but a

phenomenon that impacts on both the sending and the receiving country's development.

In relation to the points and to give substance to claims regarding the benefits of migration, there is a need to intensify and consolidate work on migration and labour mobility and to establish mechanisms for information and research exchange.

As to research and analysis, in-depth studies on the following are required:

- Migration and development linkages, including:
  - Key indicators for understanding migration policies' impact on development and development policies' impact on migration, including developing a conceptual framework and tools to better understand and "measure" these linkages and their impacts,
  - The appropriate policy mix to meet key Millennium Development Goals, including poverty reduction, gender empowerment, improvements in education and health conditions, through migration,
  - Specific country case studies where communities have benefitted from (or have been negatively affected by) migration using the MDGs as the development benchmark.
- Opportunities for trade, investment and developmental links between countries of origin and countries of destination,
- "Job-availabilities"/"employment opportunities" on a per sector, skill set, gender and age, country/group of country basis to enable sending countries to review and reinforce their supply capacities to meet the demands of the external market,
- Remittances and their productive uses, highlighting the role played by sending and receiving governments, the diaspora population and migrant communities in the sending and receiving countries, either individually or in cooperation with each other (co-development initiatives),

- Best practices in migration management and maximizing migration and development linkages, preferably kept in a single database to be managed by a group of States (*e.g.,* through the Global Forum on Migration and Development process) or organizations (*e.g.,* through the Global Migration Group) to serve as a rich source of information for stakeholders,
- Brain drain, circular migration and temporary worker schemes, and
- Fostering recognition of qualifications, and
- Documentation, research and analysis of the extent of migrants' violation of human rights.

Such studies will provide useful information to assess the human rights situation of migrants. The on-going discussions, debate and work on migration and development issues, including by the Global Migration Group and the Global Forum on Migration and Development, should be sustained and scaled-up and the rich information, data and best practices arising from all these should produce lessons and serve as useful tools in untangling the intricacies of migration and development.

The ultimate aim is to emphasize the complementary nature of migration and development, both as phenomena and at the policy level and to reach a "comfort zone" for all stakeholders where migration would finally be seen as beneficial for all.

MIGRATION DATA AND THE HUMAN RIGHTS PERSPECTIVE

Official statistics can provide useful information to monitor and assess the effectiveness of measures to safeguard the rights of migrants. Some data collection systems provide critical information about vulnerable groups, such as asylum seekers, victims of trafficking or children migrating on their own (unaccompanied minors). Available statistics also permit, under certain circumstances, to estimate the number of migrants in an irregular situation who, because of such irregularity, tend to be more vulnerable to human rights

violations. Administrative data can be used to monitor the implementation of human rights instruments at the country level. International organizations and special rapporteurs often rely on the compilation of national data to report on the compliance of States Parties with the international treaties that they have ratified.

For purposes of understanding the extent to which a receiving State and its institutions are successful in safeguarding the rights of migrants, the information of greatest interest is that relative to the foreign population, since non-nationals are more likely than nationals to be in situations where their human rights are not fully respected. Data on the number of foreigners living in a country can be obtained from population censuses provided they record the country of citizenship of persons enumerated. The Principles and Recommendations for Population and Housing Censuses, Revision 2, population censuses should record both the country of birth and the country of citizenship of each person enumerated.

Having information on both of those characteristics allows the identification of migrants who are non-nationals and those who are nationals of the country they find themselves in and permits, therefore, an assessment of differential outcomes between those two groups. When differences exist, they may be indicative of problems in safeguarding the rights of non-nationals.

Census data on population by citizenship often provide information on the number of stateless persons, a group that requires special attention because stateless persons cannot avail themselves of the national protection of a State. Tabulations of the enumerated population by country of citizenship should present the number of stateless persons as a separate category.

Although stateless persons are not necessarily migrants, statelessness often arises as a result of international migration. Among the roughly 200 countries or areas that have carried out censuses since 1960, 77 have reported the number of stateless persons. Countries having large numbers of stateless persons tend to be those that have emerged recently from the

disintegration of larger States. Consistent reporting of such data by all countries would allow a better monitoring of the success of efforts to reduce statelessness in accordance with international instruments. Comparisons between nationals and non nationals by sex can be especially useful in determining whether foreign women face more barriers to the enjoyment of the full array of human rights than their male counterparts or than women who are nationals.

For instance, analysis of differences in the labour force participation of women and men of different citizenships has been useful in unveiling major differences among groups having different nationalities and has provided the basis for further research into how overt or covert discrimination prevents some groups of non-nationals from fully enjoying their labour rights.

Migrant women may also face particular large numbers of stateless persons tend to be those that have emerged recently from the disintegration of larger States. Consistent reporting of such data by all countries would allow a better monitoring of the success of efforts to reduce statelessness in accordance with international instruments. Protection challenges during and after the migration process. For instance, available data suggest that migrant women are more vulnerable to human trafficking and related abuses than migrant men. Children and young persons below the age of majority are more vulnerable than adults when faced with situations in which their basic human rights may be at risk. It is therefore important for countries to disseminate data on flows of international migrants classified by age group and sex as well as information on the number of unaccompanied minors and on migrant children separated from their families.

One problem in gathering the data required to assess the prevalence of human rights violations is that, when migrants find themselves in irregular situations, they are unlikely to contact local authorities to report the abuses they may be experiencing, especially if the migrants concerned are not aware of the rights they are entitled to. Proactive action by countries of origin to inform their emigrants of the rights they are entitled to while abroad and to provide protection through

embassies or consulates abroad can go a long way in eliciting the necessary information from migrants.

Using Data in Assessing the Respect for Human Rights: Some Examples

Over the years, the special rapporteurs appointed by the United Nations Commission on Human Rights have often relied on appropriate data to document the extent of human rights violations, as showed in their *ad hoc* reports. In 1999, the Commission appointed a Special Rapporteur on Migrant Workers. In 2002, for instance, the Special Rapporteur used administrative data provided by the Filipino Overseas Workers Welfare Administration to document the extent to which migrant workers from the Philippines were being subject to arbitrary detention in countries of destination.

Data were also presented on the number of cases in which Filipino migrant workers had been subject to abusive conditions by unscrupulous employers and the number of cases in which migrant workers had had problems related to identity documents. The Special Rapporteur has also relied on data from various sources to document the prevalence of violence against migrant women and the extent to which women have fallen prey to trafficking. The reports of the Special Rapporteur have thus played a crucial role in documenting abuses, quantifying their prevalence and encouraging corrective action. The institutionalization of data collection as a means of ensuring that there is adequate evidence to assess the degree to which human rights are respected is perhaps most advanced in the case of refugees and asylum-seekers. Thus, the availability of comprehensive data at both the aggregate and the case by case levels permits monitoring the compliance of States Parties with the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

The Convention itself has contributed to lay the basis for data collection by stipulating, in Article 35(2), that national authorities have to cooperate with the United Nations by providing statistical data on refugees. The large number of countries that have ratified the 1951 Convention and made it

part of their national legislation as well as the capacity of the United Nations High Commissioner for Refugees to maintain offices in more than 120 countries have contributed to the institutionalization of a nearly global data collection system focusing on refugees and the timely dissemination of the data available. Non-governmental organizations play a crucial role in monitoring the human rights situation of migrants and in documenting violations.

Amnesty International, for instance, includes in its annual report on the State of Human Rights a country-by-country review of the status of refugee protection and, as appropriate, respect for the rights of migrants. The Cingranelli-Richards (CIRI) Human Rights Data Project makes publicly accessible a database on quantitative information indicating government respect for 13 internationally recognized human rights. The database presents annual data for 195 countries covering the period, 1981-2006. The data gathered relate mainly to nationals, although information on non-nationals is presented for a few countries. In various parts of the world, research centres carry out surveys and produce reports based on quantitative information about various aspects of the human rights of migrants.

The Way Forward

Despite these examples of active data compilation and analysis, most countries still do not undertake the consistent collection and dissemination of data relevant for the analysis of the respect of the human rights of migrants. Given that the 2010 round of censuses is already ongoing, it is urgent for countries interested in migration to follow closely the United Nations recommendations on population and housing censuses relative to the recording of country of birth and country of citizenship so as to obtain a timely and comprehensive baseline for the further analysis of international migration and its interrelations with the challenges of safeguarding the human rights of migrants.

Availability of such data and their detailed tabulation by age and sex can provide the basis for developing other data

collection initiatives to shed light on problem areas relative to the respect of the human rights of migrants. In addition, better use could be made of administrative statistics generated during the admission or return of international migrants to assess outcomes from the perspective of human rights.

Information on the success rate of asylum-seekers in obtaining asylum or temporary permission to stay; the characteristics of persons sponsoring migrants for family reunification and the timing of the process; the naturalization of foreign nationals; information on the types of contracts used in hiring temporary migrant workers and on the number of violations reported or investigated could all shed light on the determinants of relevant migration outcomes and on whether laws and regulations governing them are being applied fairly and consistently with universally recognized human rights. While census authorities are generally disposed to transparency in their processes of data collection and diffusion, other agencies with equally important data often are not.

Law enforcement and migration agencies tend not to facilitate access to data in their possession, nor are they always amenable to suggestions from independent scholars regarding models for data collection. The data they generate are often not accessible to those who seek to monitor the human rights of the migrants. It would be important to elicit the collaboration of those agencies and to assist in devising guidelines for the appropriate and systematic dissemination of some of the administrative data they collect.